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No. 87-5468

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

SAMUEL BICE JOHNSON,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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September 14, 1987

QUESTIONS PRESENTED

1. In a death case where the principal aggravating circumstance relied on at sentencing was a 20-year-old out-of-state conviction, whether the subsequent invalidation of that conviction -- when there was no other evidence to support that aggravating circumstance -- requires reversal of petitioner's death sentence?

2. Whether the Mississippi Supreme Court's refusal to recognize the judgment of the New York Court of Appeals vacating petitioner's 1963 conviction violates the full faith and credit clause of the Constitution?

3. Whether, on the facts of this case, the "especially heinous, atrocious or cruel" aggravating circumstance is unconstitutionally vague when (a) petitioner was not the triggerman but was tried and convicted as an aider and abettor; (b) the triggerman was tried and convicted by a different jury and was not sentenced to death; and (c) the trial judge did not instruct the jury on what the "especially heinous, atrocious or cruel" aggravating circumstance meant or how to apply it, and the Mississippi Supreme Court applied no limiting construction?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
STATEMENT OF FACTS	5
A. The Mississippi Trial	6
B. The Proceedings in New York	10
C. The Mississippi Supreme Court's Decision Denying Post-Conviction Relief	11
REASONS FOR GRANTING THE WRIT	13
I. THE DECISION OF THE MISSISSIPPI SUPREME COURT UPHOLDING PETITIONER'S DEATH SENTENCE FOLLOWING THE INVALIDATION OF THE PRINCIPAL AGGRAVATING CIRCUMSTANCE CONFLICTS WITH THIS COURT'S PRECEDENTS	15
II. THE REFUSAL OF THE MISSISSIPPI SUPREME COURT TO RECOGNIZE THE JUDGMENT OF THE NEW YORK COURT OF APPEALS VACATING PETITIONER'S 1963 NEW YORK CONVICTION VIOLATES THE FULL FAITH AND CREDIT CLAUSE OF THE CONSTITUTION	22
III. THE FAILURE IN THIS CASE EITHER TO INSTRUCT THE JURY ABOUT THE MEANING OF THE "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING CIRCUMSTANCE AS APPLIED TO AN AIDER OR ABETTOR OR TO PLACE ANY LIMITING CONSTRUCTION UPON THE STATUTORY LANGUAGE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS	24
CONCLUSION	28
APPENDIX	
Johnson v. State, DP No. 43 (Miss. May 27, 1987) (opinion of Mississippi Supreme Court denying motion for post-conviction relief)	1a

Johnson v. State, DP No. 43 (Miss. July 15, 1987) (order denying motion for rehearing) 24a

Johnson v. State, 477 So. 2d 196 (Miss. 1985) (opinion of Mississippi Supreme Court affirming conviction and death sentence on direct appeal) 25a

People v. Johnson, 69 N.Y.2d 339, 506 N.E.2d 1177, 514 N.Y.S.2d 324 (N.Y. 1987) (per curiam) 53a

People v. Johnson, 125 A.D.2d 1008, 509 N.Y.S.2d 789 (4th Dep't 1986) 55a

People v. Johnson (4th Dep't Dec. 12, 1986) (order denying rehearing) 56a

People v. Johnson, Index No. 32/63 (County Ct. Monroe Ct. Oct. 29, 1986) (order resentencing Johnson to permit direct appeal and denying all other post-conviction relief) 57a

TABLE OF AUTHORITIES

Cases — Page

Baldwin v. Alabama, 472 U.S. 372 (1985) 17

Burgett v. Texas, 389 U.S. 109 (1967) 15n

Burrell v. McMann, 51 Misc. 2d 185, 273 N.Y.S.2d 9 (Sup. Ct. Clinton Co. 1966) 21

Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987) 13, 14, 19, 26

Coleman v. State, 378 So. 2d 640 (Miss. 1979) 25n

Douglas v. California, 372 U.S. 353 (1963) 10

Estelle v. Smith, 451 U.S. 454 (1981) 15n, 18

Farmland Dairies v. Barber, 65 N.Y.2d 51, 478 N.E.2d 1314, 489 N.Y.S.2d 713 (1985) 21n

Furman v. Georgia, 408 U.S. 238 (1972) 24

Gardner v. Florida, 430 U.S. 349 (1977) .....

Godfrey v. Georgia, 446 U.S. 420 (1980) 26

Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982) 25n

Hall v. State, 241 Ga. 252, 244 S.E.2d 833 (1978) 24n

Hampton v. McConnell, 16 U.S. (3 Wheat) 234 (1818) 20

Jackson v. Denno, 378 U.S. 368 (1964) .....

Johnson v. Muelberger, 340 U.S. 581 (1951) 21

Johnson v. State, 477 So. 2d 196 (Miss. 1985), cert. denied, 106 S. Ct. 1958, reh'g denied, 106 S. Ct. 2930 (1986) ..... passim

Johnson v. Thigpen, 806 F.2d 1243 (5th Cir. 1986), cert. denied, 107 S. Ct. 1618 (1987) 25n

Kellogg v. State, 504 P.2d 440 (Okla. Crim. App. 1972) 21n

Lindsey v. Smith, 820 F.2d 1137 (11th Cir. 1987) 19n

Loper v. Beto, 405 U.S. 473 (1972) 15n

Cases	Page
Milliken v. Meyer, 311 U.S. 457 (1940)	22
Mississippi State Bar v. Phillips, 385 So. 2d 943 (Miss. 1980)	21n
People v. Huntley, 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965)	7n
People v. Johnson, 69 N.Y.2d 339, 506 N.E.2d 1177, 514 N.Y.S.2d 324 (1987), rev'g 125 A.D. 2d 1008, 509 N.Y.S.2d 789 (4th Dep't 1986)	2, 10
People v. Montgomery, 24 N.Y.2d 130, 247 N.E.2d 130, 299 N.Y.S.2d 156 (1969)	22
People v. Rivera, 39 N.Y.2d 519, 349 N.E.2d 825, 384 N.Y.S.2d 726 (1976)	22
People v. Waterman, 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70 (1961)	
People v. Willis, 79 A.D.2d 1036, 435 N.Y.S.2d 38 (2d Dep't 1981)	21n
Phillips v. State, 421 So. 2d 476 (Miss. 1982)	9, 15
Profitt v. Florida, 428 U.S. 242 (1976)	25, 25n
Ritter v. Smith, 726 F.2d 1505 (11th Cir.), cert. denied, 469 U.S. 869 (1984), vacated on other grounds, 811 F.2d 1398 (11th Cir.), cert. denied, 107 S. Ct. 3242 (1987)	19
Ruiz v. Lockhart, 806 F.2d 158 (8th Cir. 1986)	13, 19
Slater v. State, 316 So. 2d 539 (Fla. 1975)	
Smith v. Murray, 106 S. Ct. 2661 (1986)	14n, 18, 20
Smith v. Procunier, 769 F.2d 170 (4th Cir. 1985), cert. denied sub nom., Smith v. Sielaff, 106 S. Ct. 245, aff'd on other grounds sub nom., Smith v. Murray, 106 S. Ct. 2661 (1986)	19
Townsend v. Burke, 334 U.S. 736 (1948)	12, 16, 17
Underwriters National Assurance Co. v. North Carolina Life & Accident & Health Insurance Guaranty Ass'n, 455 U.S. 691 (1982)	20
United States v. Tucker, 404 U.S. 443 (1972)	12, 15-16, 17
Wheat v. Thigpen, 793 F.2d 621 (5th Cir. 1986), cert. denied, 107 S. Ct. 1566 (1987)	15n

Cases	Page
Wilson v. Butler, 813 F.2d 664 (5th Cir.), rehearing granted, Slip. op. at 6 (5th Cir. August 17, 1987) (available on LEXIS, GENFED Library)	19
Wisconsin v. Pelican Insurance Co., 127 U.S. 265 (1888)	21n
Ex parte Wolfson, 30 Cal. 2d 20, 180 P.2d 326 (1947)	21n
Woodard v. Sargent, 806 F.2d 153 (8th Cir. 1986)	13, 19
Zant v. Stephens, 462 U.S. 862 (1963)	11-12, 15, 15n, 16-17, 18, 18n
Constitutional Provisions	
U.S. Const. Art. IV, § 1	2
U.S. Const. Amend. VIII	2
U.S. Const. Amend. XIV, § 1	2-3
Statutes	
Judicial Code	
28 U.S.C. § 1257(3) (1982)	2
28 U.S.C. § 1738 (1982)	20
Miss. Code Ann.	
§ 97-3-19(2) (Supp. 1986)	8n
§ 99-19-101 (Supp. 1986)	3, 8n, 19n, 24
§ 99-19-101(5)(b) (Supp. 1986)	7
§ 99-19-101(5)(e) (Supp. 1986)	9
§ 99-19-101(5)(h) (Supp. 1986)	9
§ 99-39-1 et seq. (Supp. 1986)	4
N.Y. Penal Law	
§ 120.05 (McKinney 1975 & Supp. 1975-86)	7
§ 243 (repealed 1967)	7
§ 244 (repealed 1967)	7
Other Authorities	
R. Rosen, The "Especially Heinous" Aggravating Circumstance in Capital Cases - The Standardless Standard, 64 N.C.L. Rev. 941 (1986)	25

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MISSISSIPPI

Petitioner Samuel Bice Johnson respectfully prays that a writ of certiorari issue to review the judgment of the Mississippi Supreme Court entered on May 27, 1987.

OPINIONS BELOW

The opinion and order of the Mississippi Supreme Court denying Johnson's motion for post-conviction relief is not yet officially reported; it is reprinted at pages 1a-23a of the Appendix to this petition. The order of the Mississippi Supreme Court denying Johnson's petition for rehearing is unreported; it is reprinted at page 24a of the Appendix. The opinion of the Mississippi Supreme Court affirming Johnson's 1982 conviction and sentence on direct appeal is reported at Johnson v. State, 477 So. 2d 196 (Miss. 1985), and is reprinted at pages 25a-52a of the Appendix.

The decision of the New York Court of Appeals reversing Johnson's 1963 conviction for assault in the second degree and dismissing the underlying indictment is reported at People v. Johnson, 69 N.Y.2d 339, 506 N.E.2d 1177, 514 N.Y.S.2d 324 (1987) (per curiam), and is reprinted at pages 53a-54a of the Appendix. The opinion of the New York Supreme Court, Appellate Division, Fourth Department denying Johnson's motion to vacate his 1963 conviction is reported at People v. Johnson, 125 A.D.2d 1008, 509 N.Y.S.2d 789 (4th Dep't 1986), and is reprinted at page 55a of the Appendix; that court's order denying rehearing is reprinted at page 56a of the Appendix. The opinion of the County Court for Monroe County resentencing petitioner but otherwise denying post-conviction relief is unreported; it is reprinted at pages 57a-61a of the Appendix.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) (1982). The judgment of the Mississippi Supreme Court denying Johnson's motion for post-conviction relief was entered on May 27, 1987. A timely motion for rehearing was filed on June 11, 1987 and was denied by the Mississippi Supreme Court on July 15, 1987.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Art. IV, § 1:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State; and the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.

U.S. Const. Amend. VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. Amend XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1738 (1982): State and Territorial statutes and judicial proceedings; full faith and credit.

* * *

> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court and that the said attestation is in proper form.
>
> Such Acts, records, and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Miss. Code Ann. § 99-19-101 (Supp. 1986): Jury to determine punishment in capital cases in separate sentencing proceeding; aggravating and mitigating circumstances to be considered.

* * *

> (5) Aggravating circumstances shall be limited to the following:
>
> * * *
>
> (b) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.
>
> * * *
>
> (e) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
>
> * * *
>
> (h) The capital offense was especially heinous, atrocious or cruel.
>
> * * *

STATEMENT OF THE CASE

Johnson was tried and convicted of capital murder in Pike County, Mississippi in 1982 and sentenced to death. His conviction and sentence were affirmed on direct appeal by the Mississippi Supreme Court. Johnson v. State, 477 So. 2d 196 (Miss. 1985) (24a-52a). He petitioned this Court for a writ of certiorari, which was denied. Johnson v. Mississippi, 106 S. Ct. 1958 (1986) (Brennan and Marshall, JJ., dissenting). His petition for rehearing was also denied. Johnson v. Mississippi, 106 S. Ct. 2930 (1986).

On August 4, 1986 Johnson filed a motion for post-conviction relief under the Mississippi Uniform Post-Conviction Relief Act, Miss. Code Ann. §§ 99-39-1 et seq. (Supp. 1986). The Mississippi Supreme Court granted a stay of execution to permit him to pursue his state law post-conviction remedies. On March 24, 1987 the New York Court of Appeals reversed Johnson's 1963 New York conviction for second degree assault, which had been relied on at sentencing at the 1982 Mississippi trial.

On May 27, 1987 the Mississippi Supreme Court, by a 6-3 vote, denied Johnson's motion for post-conviction relief and set a new execution date of July 22, 1987.

On June 4, 1987 petitioner filed a motion with the Mississippi Supreme Court seeking a stay of execution to permit him to file a timely petition for certiorari with this Court. On June 11, 1987, while that motion was pending, Johnson filed a motion for rehearing. On July 13, 1987 the Mississippi Supreme Court granted a stay of execution to permit Johnson to

seek review of its May 27, 1987 decision in this Court. On July 15, 1987 the Mississippi Supreme Court denied Johnson's motion for rehearing without opinion.

STATEMENT OF FACTS

In 1963 Johnson, a black man who was then 21 years old, was convicted of second degree assault in the County Court for Monroe County, New York. He was sentenced to 1 to 3 years in jail, served one year and was paroled for good behavior. In 1982 Johnson was tried in Pike County, Mississippi and convicted of capital murder on an aiding and abetting theory in connection with the death of a white State Highway Patrolman. The 1963 New York conviction was introduced and relied upon as the principal aggravating circumstance at the sentencing phase of Johnson's Mississippi trial.

Johnson was not the triggerman, a fact conceded by the State (R. 2277)[1] and acknowledged by the Mississippi Supreme Court on direct appeal. Johnson v. State, 477 So. 2d at 206-07 (35a). The triggerman and another accomplice, each of whom was separately tried and convicted, were sentenced to life imprisonment; a third accomplice, who testified for the State, was sentenced to 25 years in jail. Only Johnson was sentenced to death.

After his conviction was affirmed on direct appeal, Johnson commenced a proceeding in Mississippi for post-conviction relief. One of the issues raised in his petition for post-conviction relief was the impermissible use of the

1 "R.____" references are to the record on direct appeal of Johnson's 1982 Mississippi trial.

1963 New York conviction at sentencing. While his petition was pending before the Mississippi Supreme Court, the New York Court of Appeals, that state's highest court, reversed his 1963 New York conviction on constitutional grounds. Despite that reversal, the Mississippi Supreme Court, with three judges dissenting, denied Johnson's motion for post-conviction relief (16a).

A. The Mississippi Trial

Johnson was one of four men implicated in the death of a Mississippi Highway Patrolman, Billy Langham, who was shot to death on December 31, 1981. At his trial Johnson was represented by two court-appointed lawyers. Each had been out of law school for less than two years, and neither had previously tried a death case or any major criminal case.

Johnson was tried not as a principal, but only as an aider and abettor. The State's theory was that Johnson first stabbed Langham and then called out to the triggerman to shoot (R. 2272). However, at least three disinterested witnesses called by the State -- including a former police officer and the vice-president of a major oil company -- testified that the person who stabbed Langham was not Johnson, but another accomplice, Anthony Fields (R. 1298-99; 1326-27; 1332; 31a-33a).[2] The triggerman and the third accomplice testified at Johnson's trial, and they, too, identified Fields as the stabber (R. 1889, 2442). Apart from Fields's self-serving testimony,

2 In return for a 25-year prison term Fields agreed to cooperate with the state and testified as the prosecution's "star" witness at the trials of Johnson, the triggerman and the third accomplice.

no eyewitness identified Johnson as the stabber.[3] After a four-day trial Johnson was found guilty of capital murder (R. 2129).

At the sentencing hearing before the same jury, the Mississippi prosecutor introduced evidence that in 1963 Johnson had been convicted of second degree assault in Monroe County, New York. The Mississippi prosecutor made at least 22 references to Johnson's New York conviction (R. 2271-79; 2282-87) and used the conviction to argue that Johnson had been "previously convicted . . . of a felony involving the use or threat of violence to the person," an aggravating circumstance under Miss. Code Ann. § 99-19-101(5)(b) (Supp. 1986) (R. 2263-64). Johnson's lawyers objected to use of the New York conviction (R. 2196-97), but the objection was overruled (R. 2197).[4]

The only basis for introducing the 1963 New York conviction at Johnson's Mississippi trial was to prove a statutory aggravating circumstance. Johnson did not take the stand on his own behalf, and Mississippi does not otherwise permit a jury to consider a defendant's criminal record when it fixes his sentence for capital murder. At sentencing the Mississippi prosecutor repeatedly and wrongly characterized the New York conviction as one for "second degree assault with intent to commit first degree rape" (R. 2271-87) -- although there is not

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3 On direct appeal the Mississippi Supreme Court held that, although of several eyewitnesses Fields alone implicated Johnson as the stabber, Fields's testimony was enough to create a question for the jury. Johnson v. State, 477 So. 2d at 207 (36a).

4 Johnson also attacked the use of the 1963 conviction on direct appeal. Johnson v. State, 477 So. 2d at 218-19 (48a).

and has never been any such a crime under New York law. See N.Y. Penal Law § 120.05 (McKinney 1975 & Supp. 1975-86) and N.Y. Penal Law §§ 243, 244 (repealed 1967).

After weighing the aggravating and mitigating circumstances, as required by the Mississippi capital sentencing statute, Miss. Code Ann. § 99-19-101 (Supp. 1986), the jury sentenced Johnson to death.[5] The jury was not permitted to know that both the triggerman and a second accomplice -- who had both been convicted of the same murder at earlier, separate trials -- received life sentences (R. 2135).

The invalid 1963 conviction was the critical piece of evidence at sentencing. Referring to that conviction some 22 times, mostly in terms of "rape," the Mississippi prosecutor told the jury:

- "[A] lot of good-hearted and well-meaning people who don't understand the purpose and the necessity of capital punishment will probably say that I'm very cold and harsh and cruel when I stand here and I say that because of having been convicted of second degree assault with intent to commit first degree rape and capital murder that Samuel Johnson should die." (R. 2276) (emphasis added)

- "What concerns me is what is going to happen the next time he decides to commit a second degree assault with intent to rape and what is going to happen the next time he decides he wants a Highway Patrolman or another law enforcement officer dead." (R. 2282) (emphasis added)

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5 Under the Mississippi capital sentencing statute, there are two phases to a death penalty trial. In the guilt phase, the jury determines whether the defendant is guilty of capital murder and, therefore, death eligible. Miss. Code Ann. § 97-3-19(2) (Supp. 1986). In the sentencing phase, the same jury weighs the mitigating circumstances against the aggravating circumstances and decides whether the defendant should be sentenced to life imprisonment or death. Miss. Code Ann. § 99-19-101 (Supp. 1986).

- "When you vote to tell Judge Pittman that Samuel Johnson should suffer the penalty of death, you're going to be telling Samuel Johnson and others like him who commit second degree assault with the intent to commit first degree rape and who have a high potential for violence and who murder Highway Patrolmen and other innocent people when they're doing their jobs and going about their own business, you're going to be telling them that the people of our state have the courage to rid our state of people like that; that we don't want people like that in our state, especially when they have a violent record like that and the potentiality of hurting somebody else." (R. 2283) (emphasis added)

- "But it [a vote for death] will also stop Samuel Johnson from hurting anybody else and it will tell others like him that we don't reward people who commit second degree assault with the intent to commit first degree rape and who are returned to the penitentiary again and again and again and who have high potentiality for violent acts and who kill law officers who are doing their jobs." (R. 2286) (emphasis added)

- "You are not the one executing Samuel Johnson. Regardless of what they tell you, you're not the one. He chose that himself when he decided to be a criminal in 1963." (R. 2287) (emphasis added)

Except for his 1963 New York conviction, Johnson had no prior record of violent crime, and the State offered no other evidence in support of that aggravating circumstance. Although the jury found two other aggravating circumstances -- i.e., that the murder was "especially heinous, atrocious or cruel" (Miss. Code Ann. § 99-19-101(5)(h) (Supp. 1986)) and that it was committed to avoid arrest or to escape from custody (Miss. Code Ann. § 99-19-105(5)(e) (Supp. 1986) -- the prosecutor offered no evidence at sentencing to support these other aggravating circumstances (R. 2271-79; 2282-87). Except to read from the statutory language, the trial judge did not instruct the jury about any of the aggravating circumstances (R. 2264).

B. The Proceedings in New York

In his Mississippi petition for post-conviction relief Johnson contended that his 1963 New York conviction -- which stemmed from an incident involving his refusal to pay a prostitute for her services -- could not provide a basis for imposing the death penalty. Under Mississippi law, however, his 1963 conviction could be challenged only in the New York courts. Phillips v. State, 421 So. 2d 476, 481-82 (Miss. 1982). On July 30, 1986 Johnson's present attorneys applied for post-conviction relief in the County Court for Monroe County, New York, seeking to vacate the 1963 assault conviction.[6] In that application Johnson argued that his 1963 conviction was unconstitutional on at least three grounds and submitted affidavits supporting his claims, including one by a sitting Justice of the Supreme Court of the State of New York.[7] The Monroe County District Attorney opposed all relief sought by Johnson except for resentencing.[8]

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6 Through numerous pro se applications, Johnson had sought unsuccessfully for nearly 14 years to have the 1963 conviction vacated on constitutional grounds.

7 The grounds for reversal were (1) that the conviction was obtained as the result of a purported confession made while in police custody, after indictment and without the presence of counsel (People v. Waterman, 9 N.Y.2d 561, 175 N.E.2d 445, 216 N.Y.S.2d 70 (1961)); (2) that no hearing was held on the voluntariness of the confession (Jackson v. Denno, 378 U.S. 368 (1964); People v. Huntley, 15 N.Y.2d 72, 204 N.E.2d 179, 255 N.Y.S.2d 838 (1965)); and (3) that Johnson was denied his right to take a direct appeal from the 1963 conviction (Douglas v. California, 372 U.S. 353 (1963); People v. Montgomery, 24 N.Y.2d 130, 247 N.E.2d 130, 299 N.Y.S.2d 156 (1969)).

8 The Monroe County District Attorney conceded that resentencing was appropriate only because the sentencing minutes and uncontradicted affidavits of disinterested parties established that Johnson had not been advised of his right to appeal.

On October 25, 1986 the County Court ordered that Johnson be resentenced to permit him to take a direct appeal from his 1963 conviction and otherwise denied his petition. In its order that court expressly found that petitioner had never been informed of his right to take an appeal, and that the affidavits submitted on his behalf raised appealable issues (59a). Johnson then appealed to the Appellate Division, Fourth Department, which held that he was procedurally barred from appealing his 1963 conviction (55a). On rehearing, the Appellate Division adhered to its earlier decision and denied relief (56a).

The New York Court of Appeals granted leave to appeal, and on March 24, 1987 that Court unanimously reversed the Appellate Division's order, vacated the 1963 conviction and dismissed the underlying indictment on the ground that Johnson had been denied his constitutional right to appeal. People v. Johnson, 69 N.Y.2d 339, 506 N.E.2d 324, 514 N.Y.S.2d 1177 (1987) (per curiam).

Johnson promptly notified the Mississippi Supreme Court that the New York Court of Appeals had vacated his 1963 conviction and filed with it a certified copy of the judgment of the Court of Appeals. He also filed a supplemental memorandum with the Mississippi Supreme Court reasserting his right to have his death sentence vacated in light of the decision by the New York Court of Appeals. The State of Mississippi submitted no papers in opposition.

C. The Mississippi Supreme Court's Decision Denying Post-Conviction Relief

On May 27, 1987 the Mississippi Supreme Court denied

Johnson's petition for post-conviction relief. Both the majority and the dissent recognized that the issue presented was one of first impression (see 5a and Op. of Robertson, J., dissenting, at 17a). Both opinions addressed the merits of Johnson's claim that his death sentence could not stand because it depended on a subsequently invalidated conviction that the State had heavily relied on in arguing to the jury for the death penalty.

In rejecting Johnson's claim, the majority held that the subsequent invalidation of Johnson's 1963 conviction was not "a basis to vitiate the [death] verdict of the jury" (6a). Initially, the majority noted that the jury had found three aggravating circumstances, and said "we have little doubt that in a rational sentencing process, Zant v. Stephens, [462 U.S. 862 (1983)], the other two aggravating circumstances would carry greater weight than the New York conviction in determining petitioner's sentence" (id.). Nonetheless, the majority stated that it "eschew[ed] 'harmless error'" in its reasoning because "the [Mississippi prosecutor] argued this particular aggravating circumstance as a reason to impose the death penalty" (id.). Next, the majority stated that "[i]f we adopted petitioner's argument, the State could never use a conviction as an aggravating circumstance, because of the extreme likelihood that a foreign state could overturn the prior conviction through collateral attack" (7a; emphasis added). Finally, the majority suggested -- citing nothing in the record -- that the decision of the New York Court of Appeals was not controlling on the Mississippi courts because the New York proceedings did not appear to be "truly adversarial" (8a). It went on to say that "the state's attorney in New York had no

significant interest or concern in vouchsafing the validity of [the] 1963 conviction" (id.), and that it was Mississippi, not New York, that "had the greatest interest in upholding the validity of [the] New York conviction" (id.).

Three justices dissented, arguing that where a prior conviction is "successfully" and "vigorously" argued by the prosecution as an aggravating circumstance (17a), resentencing is required "should the prior conviction ultimately be set aside" (20a). The dissenters criticized the majority for giving the decision of the New York Court of Appeals "less than full faith and credit" (19a) and argued that the invalidation of Johnson's 1963 conviction "undermines confidence in the outcome of the penalty phase of his capital murder trial" (23a).

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari and reverse the judgment below because the Mississippi Supreme Court has fundamentally misconstrued this Court's decision in Zant v. Stephens, 462 U.S. 862 (1983), and declined to follow its decisions in United States v. Tucker, 404 U.S. 443 (1972), and Townsend v. Burke, 334 U.S. 736 (1948). Tucker and Townsend hold that, even in non-death cases, a criminal sentence that rests on a prior conviction that is subsequently invalidated must be vacated. Zant reaffirms Tucker and Townsend and holds that, in death cases, the subsequent invalidation of an aggravating circumstance requires resentencing except where (a) the evidence submitted in support of the failed circumstance would have been otherwise admissible and (b) the particular statutory scheme for imposing capital punishment did not require the jury to weigh the invalid aggravating circumstance with other valid

aggravating and mitigating circumstances. Here, the prior violent felony conviction aggravating circumstance is supported only by evidence of an unconstitutional and now vacated prior conviction -- which the prosecutor repeatedly mischaracterized as a conviction for rape. The jury was expressly required to weigh that conviction in the balance when it decided whether to impose the death penalty.

The decision of the Mississippi Supreme Court is inconsistent with decisions of the Eight and Tenth Circuits which hold that, under Zant, a death sentence that is based on an invalid aggravating circumstance must be vacated where the sentencer weighed the invalid circumstance in fixing the sentence. Cartwright v. Maynard, 822 F.2d 1477, 1483 (10th Cir. 1987); Woodward v. Sargent, 806 F.2d 153, 156-57 (8th Cir. 1986); Ruiz v. Lockhart, 806 F.2d 158, 160 (8th Cir. 1986). The need for review in this case is made more compelling by the Mississippi Supreme Court's refusal to give full faith and credit to the judgment of the New York Court of Appeals vacating Johnson's 1963 conviction.

This Court should also grant certiorari and reverse the judgment below because, on the facts of this case, the "especially heinous, atrocious or cruel" aggravating circumstance relied on by the jury is unconstitutionally vague. We know of no other case where a defendant charged only as an aider and abettor was sentenced to death when no one else convicted of the same crime -- including the triggerman -- received a death sentence. Where a jury is allowed unbridled discretion to impose the death penalty because it is not told what "especially heinous, atrocious or cruel" means, and where

the state does not apply a limiting construction, see Johnson v. Thigpen, 806 F.2d 1243, 1247 (5th Cir. 1986), cert. denied, 107 S. Ct. 1618 (1987) (finding that the Mississippi Supreme Court has not consistently applied a limiting instruction of the "especially heinous, atrocious or cruel" aggravating circumstance), that death sentence violates the Eighth and Fourteenth Amendments and cannot stand. Cartwright v. Maynard, supra, 822 F.2d at 1483.

I.

THE DECISION OF THE MISSISSIPPI SUPREME COURT UPHOLDING PETITIONER'S DEATH SENTENCE FOLLOWING THE INVALIDATION OF THE PRINCIPAL AGGRAVATING CIRCUMSTANCE CONFLICTS WITH THIS COURT'S PRECEDENTS

The jury that sentenced Johnson to death would have perceived him very differently had it not been led to believe that he had been convicted in 1963 of "second degree assault with intent to commit first-degree rape" -- a void conviction for a non-existent crime. Evidence of that conviction was not admissible, and the State offered no evidence of any other violent felony conviction. The prosecutor's repeated references to the invalid 1963 conviction put before the jury a critical erroneous fact that could not have failed to affect its ultimate decision that Johnson should die.

This petition presents the issue on which this Court granted certiorari in Smith v. Murray, 106 S. Ct. 2661 (1986), cert. granted sub nom. Smith v. Sielaff, 106 S. Ct. 245 (1985), but did not reach -- the validity of a death sentence based, in part, on constitutionally inadmissible evidence. This petition also presents the issue on which this Court expressly reserved decision in Zant v. Stephens:

> "'The State of Georgia] acknowledges that, if an invalid statutory aggravating circumstance were supported by material evidence not properly before the jury, a different case would be presented. . . . We need not decide in this case whether the death sentence would be impaired in other circumstances, for example, if the jury's finding of an aggravating circumstance relied on materially inaccurate or misleading information." 462 U.S. at 887 n.24 (emphasis added).

Both issues are ripe for decision in this case, and certiorari should be granted.[9]

This Court has repeatedly held, even in non-death cases, that a sentence must be set aside if it is based on an unconstitutional prior conviction or "misinformation" of constitutional magnitude. In United States v. Tucker, 404 U.S. 443, 444-45 (1972), the defendant, after being sentenced in a non-capital case, succeeded in post-conviction relief proceedings in vacating two convictions -- one 15 years old and the other 9 years old -- that had been considered by the sentencer.[10] This Court noted that the "sentencing judge gave specific consideration to the respondent's previous convictions

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9 In attacking his 1963 New York conviction before seeking post-conviction relief in Mississippi, Johnson followed the procedure established by the Mississippi Supreme Court in Phillips v. State, 421 So. 2d 476, 481-82 (Miss. 1982). See also Wheat v. Thigpen, 793 F.2d 621, 625 n.2 (5th Cir. 1986), cert. denied, 107 S. Ct. 1566 (1987). Johnson objected to use of the 1963 conviction both at trial (R. 2176-77) and on direct appeal (47a-48a), and the Mississippi Supreme Court fully addressed the merits of Johnson's claim (4a-9a).

10 Tucker is part of a long line of decisions by this Court holding that a conviction will be vacated when it is based in part on an unconstitutional prior conviction. See, e.g., Loper v. Beto, 405 U.S. 473, 483 (1972) (conviction vacated when unconstitutional prior conviction used to impeach defendant's credibility); Burgett v. Texas, 389 U.S. 109, 115 (1967) (conviction vacated because "admission of a prior criminal conviction which is constitutionally infirm" "is inherently prejudicial").

before imposing sentence upon him. Yet it is now clear that two of these convictions were wholly unconstitutional. . . ." 404 U.S. at 447 (footnote omitted). Despite the fact that the sentence was based also on other, valid convictions, this Court reversed, holding that but for his unconstitutional prior convictions, "the factual circumstances of the [defendant's] background would have appeared in a dramatically different light at the sentencing proceeding." 404 U.S. at 447-48.

In Townsend v. Burke, 334 U.S. 736, 741 (1948), this Court held that a conviction and sentence would be vacated where the defendant "was sentenced on the basis of assumptions concerning his criminal record which were materially untrue." There the sentencing court considered the defendant's numerous prior convictions but it attributed to him three convictions for crimes of which he had in fact been acquitted. This Court held that "[s]uch a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand." 334 U.S. at 741.

As Justice (now Chief Justice) Rehnquist noted in his concurring opinion in Zant, "a more careful application of [the Tucker-Townsend rule] is appropriate in capital cases," and a defendant should prevail if he can show that the introduction of an invalid prior conviction "had an ascertainable and 'dramatic' impact on the sentencing authority." Zant v. Stephens, supra, 462 U.S. at 903. In this case, the now-vacated unconstitutional 1963 New York conviction was urged upon the jury by the state as the principal basis for returning a death verdict (R. 2282-87).

In Zant, this Court reaffirmed the rule that a sentence is unconstitutional and must be set aside when based on materially incorrect evidence not properly before the sentencer. Writing for the Court, Justice Stevens stated:

> "As we held in United States v. Tucker, 404 U.S. 443, 447-449 (1972), even in a noncapital sentencing proceeding, the sentence must be set aside if the trial court relied at least in part on 'misinformation of constitutional magnitude' . . . See Townsend v. Burke, 334 U.S. 736, 740-741 (1948) (reversing a sentence imposed on uncounseled defendant because it was based on 'extensively and materially false' assumptions concerning the defendant's prior criminal record)." 462 U.S. at 887 n.23.

Accord Baldwin v. Alabama, 472 U.S. 372, 382 (1986) ("a death sentence based upon consideration of 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process . . .' would violate the Constitution" (quoting Zant, 462 U.S. at 885)); Estelle v. Smith, 451 U.S. 454 (1981) (death sentence must be vacated where constitutionally inadmissible evidence is relied on at the penalty phase). Cf. Gardner v. Florida, 430 U.S. 349, 362 (1977) (vacating death sentence where it may rest on "erroneous factual predicate").

The Court in Zant held that under the Georgia capital punishment scheme the constitutional invalidity of one aggravating circumstance did not require resentencing only because it found that all evidence before the jury was "fully admissible" and properly before it via introduction through another, valid aggravating circumstance. Zant, 462 U.S. at 886. The Court noted the Georgia Supreme Court's conclusion "that a different result might be reached if the failed [aggravating] circumstance had been supported by evidence not otherwise

admissible or if there was reason to believe that, because of the failure, the sentence was imposed under the influence of an arbitrary factor." 462 U.S. at 873.[11] In this case Johnson's death sentence rests on an aggravating circumstance that is invalid because the only evidence that supported it is the 1963 conviction that has been vacated on constitutional grounds.

The reading of Zant adopted by the court below is inconsistent with that of Justice Stevens, who wrote this Court's Zant opinion. In Smith v. Murray, supra, 106 S. Ct. at 2677, four members of this Court (Stevens, Marshall, Blackmun, and Brennan, JJ., dissenting) reached the Zant issue and stated:

> "We did not conclude [in Zant] . . . that any evidence concerning the invalid circumstances was simply irrelevant because the valid circumstances were, in all events, sufficient to support the death penalty. The fact that the record adequately establishes one valid aggravating circumstance may make the defendant eligible for the death penalty but it does not justify the conclusion that a death sentence should stand even though highly prejudicial inadmissible evidence was presented to the jury at the sentencing hearing. The introduction of such highly prejudicial, inadmissible evidence -- evidence that itself represents an independent constitutional violation -- quite clearly undermines the validity of the capital sentencing proceeding and violates the Eighth Amendment." (Stevens, J., dissenting)

The majority in Smith did not reach the Zant issue.

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11 Unlike the Georgia capital sentencing statute, Mississippi's scheme requires that the jury weigh specific statutory aggravating circumstances against the mitigating circumstances. Miss. Code Ann. § 99-19-101 (Supp. 1986). The Zant Court stated that it did "not express any opinion concerning the possible significance of a holding that a particular aggravating circumstance is 'invalid' under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty." Zant, 462 U.S. at 890.

The courts of appeal are in conflict on the constitutionality of a death sentence based in part on consideration of an invalid aggravating circumstance. The Eighth and Tenth Circuits have held that the jury's consideration of an unconstitutional or invalid aggravating circumstance requires reversal of a death sentence even when other valid aggravating circumstances support the sentence. Cartwright v. Maynard, supra, 822 F.2d at 1483; Woodard v. Sargent, supra, 806 F.2d at 1560-57; Ruiz v. Lockhart, supra, 806 F.2d at 160 (8th Cir. 1986).

The Eleventh Circuit itself has split on the issue. In Ritter v. Smith, 726 F.2d 1505, 1517-19 (11th Cir.), cert. denied, 469 U.S. 869 (1984), vacated on other grounds, 811 F.2d 1398 (11th Cir.), cert. denied, 107 S. Ct. 3242 (1987), one panel held that under Zant a death sentence will be set aside if it rests on "constitutionally impermissible or totally irrelevant considerations." But a different Eleventh Circuit panel has read Zant for the rule that an invalid aggravating circumstance is subject to a harmless error analysis and a death sentence will stand when other constitutionally "sufficient" aggravating circumstances are present. Lindsey v. Smith, 820 F.2d 1137, 1154 (11th Cir. 1987).

The Fourth Circuit has also followed a harmless error reading of Zant, holding that a death sentence will stand if supported by at least one valid aggravating circumstance. Smith v. Procunier, 769 F.2d 170, 173 (4th Cir. 1985), aff'd on other grounds sub nom. Smith v. Murray, 106 S. Ct. 2661 (1986). The Fifth Circuit has read Zant to mean that an invalid statutory aggravating circumstance does not require that a death sentence be vacated when the evidence supporting the

aggravating circumstance is otherwise admissible. Wilson v. Butler, 813 F.2d 664, 677 (5th Cir.), rehearing granted, Slip op. at 6 (5th Cir. August 17, 1987) (available on LEXIS, GENFED Library).

This Court has previously granted certiorari to decide the issue presented by this petition, Smith v. Murray, supra, but found it unnecessary to reach the issue in that case. The lower courts are divided on the proper reading of Zant, and both the majority and the dissenters below characterized the issue as "novel" and one of first impression (5a, 17a). For these reasons, we submit that a writ of certiorari should issue in this case to decide whether a death sentence must be vacated when the principal aggravating circumstance on which it rests is an unconstitutional prior conviction that has been set aside.

II.

THE REFUSAL OF THE MISSISSIPPI SUPREME COURT TO RECOGNIZE THE JUDGMENT OF THE NEW YORK COURT OF APPEALS VACATING PETITIONER'S 1963 NEW YORK CONVICTION VIOLATES THE FULL FAITH AND CREDIT CLAUSE OF THE CONSTITUTION

The full faith and credit clause of the Constitution, U.S. Const. Art. IV § 1, obliged the Mississippi Supreme Court to recognize and respect the decision of the New York Court of Appeals vacating Johnson's 1963 conviction. See also 28 U.S.C. § 1738 (1982). The Mississippi court explicitly refused to do so.

This Court has long held that the forum state must lend "the same credit, validity, and effect" to a judgment as would "the state where it was pronounced." Underwriters

National Assurance Co. v. North Carolina Life & Accident & Health Insurance Guaranty Ass'n, 455 U.S. 691, 704 (1982) (quoting Hampton v. McConnell, 16 U.S. (3 Wheat.) 234, 235 (1818) (Marshall, C.J.)). Under New York law, the decision vacating Johnson's 1963 conviction rendered the 1963 indictment and all subsequent proceedings void ab initio. Burrell v. McMann, 51 Misc. 2d 185, 188, 273 N.Y.S.2d 9, 12 (Sup. Ct. Clinton Co. 1966) ("[b]y vacating the second judgment of conviction, that court declared that all proceedings relating thereto were a nullity"). The Mississippi Supreme Court declined to recognize the judgment of the New York Court of Appeals and flouted the constitutional command to give "judgments within the jurisdiction of the rendering state the same faith and credit in sister states as they have in the state of the original forum." Johnson v. Muelberger, 340 U.S. 581, 584 (1951) (footnote omitted).[12]

12 Although a state need not enforce a foreign penal judgment, the full faith and credit clause of the Constitution mandates that a state recognize a foreign state's criminal judgments. See Wisconsin v. Pelican Insurance Co., 127 U.S. 265, 291-92 (1888). See also Farmland Dairies v. Barber, 65 N.Y.2d 51, 56-57, 478 N.E.2d 1314, 1317, 489 N.Y.S.2d 713, 717 (1985) (New York recognized restrictions New Jersey placed on use of judgment convicting milk dealer of price rigging); Ex parte Wolfson, 30 Cal. 2d 20, 32, 180 P.2d 326, 333 (1947) (California must accord prior felony convictions in Pennsylvania full faith and credit in finding of habitual criminality). Indeed, the Mississippi Supreme Court has previously declared itself "bound to give full faith and credit to [criminal] judgments of our sister states." Mississippi State Bar v. Phillips, 385 So. 2d 943, 945 (Miss. 1980).

The constitutional command of full faith and credit extends to subsequent reversals of criminal judgments. See, e.g., People v. Willis, 79 A.D.2d 1036, 1037, 435 N.Y.S.2d 38, 39 (2d Dep't 1981) (New York court must recognize dismissal of Texas indictment entered after New York sentenced defendant as second felony offender; motion to vacate New York sentence granted); Kellogg v. State, 504 P.2d 440, 442 (Okla. Crim. App. 1972) ("Oklahoma could not choose to recognize one act of the sister-state, the conviction, and then ignore its subsequent act which nullified the conviction").

In denying post-conviction relief to Johnson, the Mississippi Supreme Court said it did not have to recognize the New York Court of Appeals decision because, in its view, the New York proceedings "lacked an essential adversarial ingredient" (8a) and because New York had no "significant interest" in upholding Johnson's New York conviction (id.). These accusations impugning the integrity of the New York judicial system are without basis in the record. The Mississippi Supreme Court's words attributing to the New York Court of Appeals a "motive" to "vitiate the death penalty verdict" in Mississippi when it vacated Johnson's 1963 New York conviction (7a) are equally without record support. The Court of Appeals followed its own sound precedents when it reversed Johnson's 1963 conviction. See, e.g., People v. Rivera, 39 N.Y.2d 517, 349 N.E.2d 825, 384 N.Y.S.2d 726 (1976) (reversing a 23-year old conviction where the defendant had not been advised of his right to appeal and the trial transcript was lost); People v. Montgomery, 24 N.Y.2d 130, 247 N.E.2d 130, 299 N.Y.S.2d 156 (1969). In any event, "the full faith and credit clause . . . precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or the validity of the legal principles on which the judgment is based." Milliken v. Meyer, 311 U.S. 457, 462 (1940).

The Mississippi Supreme Court's refusal to accord full faith and credit to the judgment of the New York Court of Appeals that nullified Johnson's 1963 conviction on which his death sentence depends warrants review by this Court.

III.

THE FAILURE IN THIS CASE EITHER TO INSTRUCT THE JURY ABOUT THE MEANING OF THE "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING CIRCUMSTANCE AS APPLIED TO AN AIDER AND ABETTOR OR TO PLACE ANY LIMITING CONSTRUCTION UPON THE STATUTORY LANGUAGE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS

As this case shows, the "especially heinous, atrocious or cruel" aggravating circumstance does not serve to distinguish between murders that are punishable by death and those that are not. Johnson was tried and convicted as an aider and abettor and sentenced to death, while the triggerman was tried separately and received a life sentence. The judge at Johnson's trial did not tell the jury what the "especially heinous, atrocious or cruel" aggravating circumstance means or how to apply it. The only definition of "heinous" that the jury received was an utterly bogus -- and misleading -- explanation from the prosecutor.[13]

The trial judge's entire charge to the jury on the "especially heinous, atrocious or cruel" aggravating circumstance was as follows:

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13 He told the jury in closing: ". . . I found out that the word 'heinous' means shockingly evil. Murder is an evil act. There'll be no argument with that from anybody, I don't think. Well, is the killing of a Highway Patrolman beside one of the busiest highways in our state shocking? Does it shock you to know that? It shocked me. Of course, you know what cruel means. To me, the cruelty of it has increased by the lack of necessity or justification" (R. 2274).

In the absence of any explanation of "heinous, atrocious or cruel" from the trial court, the jury could have taken the prosecutor's words to mean that it had but to conclude that the victim died beside "one of the busiest highways in our state" in order to sentence Johnson to death.

"Consider only the following elements of aggravation in determining whether the death penalty should be imposed, to-wit

1) That the Defendant, Samuel Johnson, was previously convicted of a felony involving the use or threat of violence to the person of another;

2) That the Defendant, Samuel Johnson, committed the capital murder for the purpose of avoiding arrest or effecting an escape from custody;

3) The murder was especially heinous, atrocious and cruel" (R. 2263-64).

The jury was given no guidance on how it should distinguish "especially heinous, atrocious or cruel" murders from all other murders. It was not told whether "especially heinous, atrocious or cruel" refers to the underlying crime itself or to petitioner's role as an aider and abettor. The jury was left to apply a standardless standard. See R. Rosen, The "Especially Heinous" Aggravating Circumstance in Capital Cases - The Standardless Standard, 64 N.C.L.R. 941 (1986). This failure to inform the jury, which is emphasized by the disparity between Johnson's death sentence and the life sentence the triggerman received, make that death sentence so freakish and unreliable as to constitute cruel and unusual punishment under Furman v. Georgia, 408 U.S. 238 (1972).[14]

The Mississippi Supreme Court neither required an appropriate limiting instruction by the trial court nor itself appplied any limiting construction of the kind that this Court

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14 In Hall v. State, 241 Ga. 252, 244 S.E.2d 833 (1978), the Georgia Supreme Court held that a death sentence imposed upon an aider and abettor for the same crime in which the triggerman received a life sentence cannot stand. See also Slater v. State, 316 So. 2d 539 (Fla. 1975) (imposition of death penalty where co-defendant triggerman sentenced to life is unconstitutional under Furman).

in Profitt v. Florida, 428 U.S. 242 (1976), intimated is necessary to avoid vagueness problems.[15] Indeed, on Johnson's direct appeal the Mississippi Supreme Court came close to holding that every murder is, by definition, "especially heinous, atrocious and cruel":

"The very word 'murder' embraces within its meaning cruelty, brutality and an evil intent carried to the ultimate in harm: death. It is redundant to characterize a murder as cruel, brutal or malicious." Johnson v. State, supra, 477 So. 2d at 217.

In Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980), this Court held that the "wanton or vile" aggravating circumstance was unconstitutionally vague because:

"There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' . . . . [T]he trial judge's sentencing instructions . . . . gave the jury no guidance concerning the meaning of any of [the statutory] terms. In fact, the jury's interpretation of [the statutory aggravating circumstances] can only be the subject of sheer speculation."

In Cartwright v. Maynard, supra, 822 F.2d at 1491, a unanimous Court of Appeals for the Tenth Circuit, sitting

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15 In Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982), cert. denied, 461 U.S. 910 (1983), the Fifth Circuit held that the "especially heinous, atrocious or cruel" aggravating circumstance -- as applied by the Mississippi courts -- was not unconstitutionally vague in that case because the Mississippi Supreme Court there had applied the limiting construction approved in Profitt v. Florida, supra, and had limited use of that aggravating circumstance to the "'conscienceless or pitiless crime which is unnecessarily torturous to the victim.'" Coleman v. State, 378 So. 2d 640, 648 (Miss. 1979). In Johnson v. Thigpen, supra, 806 F.2d at 1246, the Fifth Circuit held that the "especially heinous, atrocious or cruel" aggravating circumstance was unconstitutionally vague as applied in Mississippi.

en banc, held that Oklahoma's "especially heinous, atrocious or cruel" aggravating circumstance was unconstitutionally vague, even though the limiting instructions approved in Profitt had been given:

> "When the sentencer is free to rely upon any particular event that it believes makes a murder 'especially heinous, atrocious, or cruel,' the meaning that the sentencer attached to this provision 'can only be the subject of sheer speculation' . . . . The discretion of a sentencer [in such circumstances] is as complete and as unbridled as the discretion afforded the jury in Furman. No objective standard limits that discretion."

The Mississippi Supreme Court's decision in this case is in fundamental conflict with the Tenth Circuit's decision in Cartwright.

This Court should grant review to determine whether -- in this aiding and abetting case in which the death sentence depended in addition upon an unconstitutional and subsequently vacated prior conviction -- Mississippi's failure to define or limit the "especially heinous, atrocious or cruel" aggravating circumstance controverts Furman.

CONCLUSION

Petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of Mississippi.

Dated: New York, New York
September 14, 1987

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT OF MISSISSIPPI

NO. DP-43

SAMUEL RICE JOHNSON

V.

STATE OF MISSISSIPPI

ON MOTION FOR POST-CONVICTION RELIEF

HAWKINS, PRESIDING JUSTICE, FOR THE COURT:

Samuel Rice Johnson filed a petition for relief under our Mississippi Uniform Post-Conviction Relief Act (CRA), Miss. Code Ann. § 99-39-1, et seq. We address only those assignments contemplated by the CRA for which we are authorized to review in a petition of this nature. For the reasons set forth, we deny his petition.

Following a trial held in the circuit court of Pike County on August 30-September 3, 1982, Samuel Rice Johnson was convicted of capital murder and sentenced to death. His conviction was affirmed by this Court on May 8, 1985, and h. petition for rehearing was denied November 6, 1985; Johnson v. State, 477 So.2d 196 (Miss. 1985). The United States Supreme Court denied his petition for certiorari, Johnson v. Mississippi, 106 S.Ct. 1958 (May 6, 1986), and subsequently denied his petition for rehearing, 106 S.Ct. 2930. (June 16, 1986)

On August 4, 1986, he filed with this Court his petition for relief under our Mississippi Uniform Post- Conviction Relief Act (CRA), Miss. Code Ann. § 99-39-1, et seq. His petition consists of 60 pages, supported by a brief of 85 pages, a supplemental motion to amend with supporting brief, and exhibits of several hundred pages. The petition contains

43 assignments, and the amendment to the petition adds another.[1]

The purpose of a CRA petition is set forth in Miss. Code Ann. § 99-39-3(2):

> (2) Direct appeal shall be the principal means of reviewing all criminal convictions and sentences, and the purpose of this chapter is to provide prisoners with a procedure, limited in nature, to review those objections, defenses, claims, questions, issues or errors which in practical reality could not be or should not have been raised at trial or on direct appeal.

Miss. Code Ann. § 99-39-21 reads in pertinent part:

> (1) Failure by a prisoner to raise objections, defenses, claims, questions, issues or errors either in fact or law which were capable of determination at trial and/or on direct appeal, regardless of whether such are based on the laws and the Constitution of the state of Mississippi or of the United States, shall constitute a waiver thereof and shall be procedurally barred, but the court may upon a showing of cause and actual prejudice grant relief from the waiver.
>
> * * * * *
>
> (4) The term "cause" as used in this section shall be defined and limited to those cases where the legal foundation upon which the claim for relief is based could not have been discovered with reasonable diligence at the time of trial or direct appeal.
>
> (5) The term "actual prejudice" as used in this section shall be defined and limited to those errors which would have actually adversely affected the ultimate outcome of the conviction or sentence. [Emphasis added]
>
> (6) The burden is upon the prisoner to allege in his motion such facts as are necessary to demonstrate that his claims are not procedurally barred under this section.

In a petition of this nature, we are also governed by Miss. Code Ann. § 99-39-27(5):

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[1] Johnson was represented in his trial by Gerald Diaz and Gregory L. Harper of the Jackson Bar; on appeal to this Court by Kenneth J. Rose of the Atlanta Bar; in his petition to the United States Supreme Court by Clive A. Stafford Smith of the Atlanta Bar and in his present petition by Clive A. Stafford Smith of the Atlanta Bar and Laurence T. Sorkin and Anthony Paduano of the New York Bar.

> (5) Unless it appears from the face of the application, motion, exhibits and the prior record that the claims presented by such are not procedurally barred under section 99-39-21 and that they further present a substantial showing of the denial of a state or federal right, the court shall by appropriate order deny the application.

Moreover, we do not consider on a petition of this nature issues raised and decided on the original appeal, even though theories for relief different from those urged at trial and on appeal are now asserted. Miss. Code Ann. § 99-39-21(2), (3). Dufour v. State, 483 So.2d 307, 311 (Miss. 1985), (and cases cited therein).

Within these circumscribed boundaries, we address the appropriate assignments in Johnson's petition.

I.

JOHNSON'S 1963 NEW YORK CONVICTION AS AN AGGRAVATING CIRCUMSTANCE.

During the course of the sentencing phase of trial, the State introduced an authenticated copy of a judgment of conviction of Johnson of assault, second degree with intent to commit rape, first degree, rendered by the Monroe County court New York on April 9, 1963. This was offered as one of three aggravating circumstances to support the death penalty. (R.2171-2173). Johnson did not testify either at the guilt or sentencing phase of his trial.

During the course of his argument, the district attorney recited this conviction as a basis for the jury to render a death penalty verdict. (R.2273)

In his motion for a new trial and on appeal, Johnson objected to the introduction of the record of the conviction because it did not channel the jury's discretion by "clear and objective standards," and because it was too remote. (Appellant's Brief, pp.29-31) We rejected both arguments. 477 So.2d 218-219.

In his petition for certiorari to the U.S. Supreme Court, no claim of error was made to the introduction of this record into evidence as an aggravating circumstance.

In this petition, for the first time, Johnson argues that the 1963 conviction was invalid. Apparently, following or commensurate with its filing, Johnson's counsel also took steps to have this conviction vacated by the New York courts. This Court has been furnished with a copy of an order and slip opinion of the Court of Appeals of New York, dated March 24, 1987, in which that court did indeed reverse and vacate this 1963 conviction and dismiss the indictment.

From the exhibits it appears that Johnson did not appeal his 1963 conviction and that he served a year in a New York correctional institution for this crime.

Miss. Code Ann. § 99-19-101(5)(b) provides:

> (5) Aggravating circumstances shall be limited to the following:
>
> * * * * *
>
> (b) The defendant was previously convicted of another capital offense or of a felony involving the use of threat of violence to the person.

The aggravating circumstances enumerated in the court's instruction at trial were:

> (1) That the defendant, Samuel Johnson, was previously convicted of a felony involving the use or threat of violence to the person of another.
>
> (2) That the defendant, Samuel Johnson, committed the capital murder for the purpose of avoiding arrest or effecting an escape from custody.
>
> (3) The capital murder was especially heinous, atrocious and cruel.

(R.2236)

The verdict of the jury found all three of these aggravating circumstances existed. (R.2294)

It is apparent that Johnson waived this claim, and it is procedurally barred. At no time during his direct appeal, or

in his petition for certiorari to the U.S. Supreme Court did he argue his New York conviction was constitutionally invalid. Moreover, there is nothing to suggest he took any steps to vacate this conviction until he filed this petition. On appeal Johnson's counsel alleged thirteen assignments of error, and at Johnson's own urging, his counsel added seven additional assignments. None questioned the validity of his New York conviction. See Evans v. State, 485 So.2d 276 (Miss. 1986), at 280-281.

Also, the jury found three aggravating circumstances to support its verdict. Even if we conceded that the jury had no authority to consider this conviction, the remaining two aggravating circumstances were sufficient to support the jury's verdict. Kent v. Stephens, 462 U.S. 862, 77 L.Ed.2d 235, 252-254, 103 S.Ct. 2733 (1983); Irving v. State, 498 So.2d 305, 314 (Miss. 1986).

Aside from the statutory limitation of review, we remain unpersuaded by this contention.

We have never faced this question. A somewhat similar question has been before us concerning the use of a prior criminal conviction to impeach a defendant in a criminal trial. We have held that subsequent reversal on appeal of a prior conviction did not affect a defendant's trial conviction. Young v. State, 425 So.2d 1022 (Miss. 1983); Milstid v. State, 347 So.2d 1319 (Miss. 1977); and Nicholson v. State, 254 So.2d 881 (Miss. 1972).

Also, in Phillips v. State, 421 So.2d 476 (Miss. 1982), the state used a Kentucky conviction as a basis for Phillips' conviction under one of Mississippi's habitual criminal statutes. Miss. Code Ann. § 99-19-81 (Supp. 1984). We held that when the conviction was subsequently reversed, it could constitute a basis for post-conviction relief from the habitual criminal conviction.

Under Miss. Code Ann. § 99-19-81, however, upon proof of the prior conviction a circuit judge has no alternative except to sentence to the maximum authorized by law. Such sentence cannot be suspended, and the accused will never be eligible for parole or probation prior to serving this maximum sentence. In the sentencing phase of a capital murder trial the jury is not required to sentence the defendant to death, regardless of its finding.

When a prior conviction is used under either habitual offender statute, it is, of course, certain that the defendant will receive greater punishment. The admission of a prior conviction in order to impeach the accused as a witness, or at a sentencing phase of a capital murder trial may or may not materially influence the jury.

As we noted, the jury found three aggravating circumstances existed, and of the three we have little doubt that in a rational sentencing process Sant v. Stephens, supra, the other two aggravating circumstances would carry greater weight than the New York conviction in determining Johnson's sentence. Indeed, the remoteness in time of the prior conviction was a mitigating circumstance. Johnson v. State, 477 So.2d at 219.

We eschew "harmless error" in our reasoning, however, because the district attorney argued this particular aggravating circumstance as a reason to impose the death penalty. Johnson v. State, 477 So.2d at 219. Nevertheless, we reject New York's setting aside of the 1963 conviction as a basis to vitiate the verdict of the jury.

If there is one single point emphasized by the U.S. Supreme Court decisions of Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); and Furman v. Georgia, 408 U.S. 238, 92 S.Ct 2726, 33 L.Ed.2d 346 (1972), it is that before a jury is permitted to sentence

a human being to death, it must have clear guidelines. The centerpiece of these decisions requires the jury to find one or more aggravating circumstances exist before they can impose the death sentence. Of course, any such "aggravating circumstance" must reasonably justify making the difference between imposing a life sentence or the death penalty.

If the death penalty is to be imposed without caprice or chance, there is no doubt that a crucial guideline to assist citizens who have this formidable responsibility is whether the convicted murderer has engaged in serious criminal conduct involving violence to other people in the past. Thus, the reason for Miss. Code Ann. § 99-19-101(5)(b).

There is no question but that the state proved this aggravating circumstance in this case. At the time of Johnson's trial, New York had imposed a final conviction and Johnson had served his sentence.

If we adopted Johnson's argument, the state could never use a conviction as an aggravating circumstance, because of the extreme likelihood that a foreign state could overturn the prior conviction through collateral attack. The loss of this guideline to a jury would serve to return juries to the unbridled, unchannelled, and hence, unconstitutional discretion they had in imposing the death sentence.

We are not required in this case to go as far as Nicholson, Milstid and Young, supra, in authorizing introduction of proof of a prior conviction in a capital murder case. That is, in this case, we do not address whether a prior conviction can be used as an aggravating circumstance if that conviction is subsequently reversed on direct appeal. We do hold that a foreign state cannot vitiate the death penalty verdict in this state by setting aside a prior conviction of a violent crime through a collateral relief petition.

We deem it important to add in this case that there is no evidence or indication that the post-conviction relief proceedings in the New York courts were truly adversarial. Insofar as we can determine from Johnson's petition and exhibits, the state's attorney in New York had no significant interest or concern in vouchsafing the validity of his 1963 conviction, and we find no challenge by the state's attorney of New York of Johnson's petition. Other than Johnson, this state had the greatest interest in upholding the validity of his New York conviction. Yet, this state was not made a party to Johnson's petition and had no voice in any of the New York proceedings to vacate his conviction. Indeed, we know of no method whereby this state could have been made a party to the New York proceedings, and this state probably should not have been a party. This does not remove the fact that the proceedings lacked an essential adversarial ingredient. The New York courts are, of course, the final and proper arbiters of all judicial proceedings in that state, including the disposition of post-conviction petitions. Assuredly, by our view, we suggest no impropriety in the courts of that state taking whatever action they deem appropriate in a criminal case in New York. The fact remains that Johnson was convicted in 1963 by a New York court of a serious felony involving violence to a female for which he was imprisoned in that state. No New York court extended Johnson relief from his conviction before Johnson paid his debt to the state. If his crime was serious enough for him to be convicted and final enough for him to serve time in a penal institution, it had sufficient finality to be considered as an aggravating circumstance by a jury of this state. No death penalty verdict based upon this conviction need be vitiated by the subsequent relief granted more than twenty years later by the New York Court of Appeals.

We accordingly reject all assignments of Johnson's petition based upon his 1963 conviction in the State of New York.

II.

INEFFECTIVE COUNSEL

The only remaining assignments of Johnson not clearly procedurally barred are assignments VII and VIII wherein he claims his trial counsel were ineffective in their representation of him during the guilt and sentencing phases of his trial, thus depriving him of his Sixth Amendment right to assistance of counsel. Under the assignments he lists some forty instances in which he claims his lawyers did not render professional service guaranteed to him by the Sixth Amendment.

The Sixth Amendment states the accused has the right "to have the Assistance of Counsel for his Defense."

Literally hundreds of court decisions have grappled with this phrase since the U.S. Supreme Court in Powell v. State, 287 U.S. 45, 77 L.Ed. 158, 53 S.Ct. 55, 84 A.L.R. 527 (1932), announced the Sixth Amendment required something more than just having a person with a law license sitting at the counsel table with an accused. Also, Avery v. Alabama, 308 U.S. 444, 445, 84 L.Ed 377, 60 S.Ct. 32 (1940). A number of these cases are annotated and the various authorities examined in 4 A.L.R.4th 1 — 244 (1980); see also 1986 supplement.

In 1984 the U.S. Supreme Court in two seminal cases set forth guidelines to determine whether the constitutional guaranty had been met. U.S. v. Cronic, 466 U.S. 648, 80 L.Ed.2d 657, 104 S.Ct. 2039 (1984); and Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984).

Strickland tells us the benchmark inquiry is whether defense "counsel's conduct so undermined the proper

functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 692-693. It is an attack on the "fundamental fairness of the proceeding." Id. at 700. The Court then held the "proper standard for attorney performance is that of reasonably effective assistance," and it was incumbent upon a defendant to show that "counsel's representation fell below an objective standard of reasonableness. More specific guidelines are not appropriate." Id. at 693. Also, "judicial scrutiny of counsel's performance must be highly deferential," and "every effort be made to eliminate the distorting effects of hindsight." Id. at 694. The Court must then determine "whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." [Emphasis added] Id. at 695.

In addition, the accused must show he was prejudiced. That is, he must prove there is "a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." [Emphasis added] Id. at 698.

And finally, in determining whether ineffectiveness of counsel justifies setting aside a conviction, the appellate court may "independently weigh the evidence," and decide whether the aggravating and mitigating circumstances on balance warranted the death penalty.

This Court has followed the guidelines of Strickland in Irving v. State, 498 So.2d 305 (Miss. 1986); Evans v. State, 485 So.2d 276 (Miss. 1986); Dufour v. State, 483 So.2d 307 (Miss. 1985); Leatherwood v. State, 473 So.2d 964 (Miss. 1985); Lambert v. State, 462 So.2d 308 (Miss. 1984); Gilliard v. State, 462 So.2d 718 (Miss. 1985).

What then does "assistance of counsel" mean?

It obviously means an accused has the right to a lawyer to represent him. Just as obviously, it cannot mean there is a constitutional guaranty to a lawyer who in hindsight made no errors in defending the case. This would be tantamount to a constitutional guaranty of non-conviction. It would lend to continued court battles with successive defense lawyers, each of whom in hindsight could be found to have made mistakes. This never ending battle would continue until the state wearily threw in the towel. Covington v. State, 600 S.W.2d 186 (Mo.App. 1980); People v. Moody, 676 P.2d 691 (Colo. 1984); Commonwealth v. Saferian, 366 Mass. 89, 315 N.E.2d 878 (1974); State v. Wolf, 347 N.W.2d 573 (N.D. 1984).

Yet, if the Sixth Amendment guaranty has any meaning it must mean more than simply having a man admitted to law practice as a defense lawyer for the accused. U.S. v. Cronic, supra. It must mean that a lawyer with some competence conscientiously represented the accused. Dufour v. State, supra. It must require both, because an incompetent can be conscientious, and an otherwise competent lawyer can by a lack of concern for his responsibility, fail in his adversarial duty.

Yet it does not necessarily mean that a lawyer was either incompetent or failed to responsibly represent his client because he made mistakes. However, conduct of an attorney, including the mistakes he made, can very well be of such proportion as to reveal the lack of competence or diligence. Leatherwood v. State, supra.

Therefore, any Court seeking to determine whether the constitutional guaranty has been met, must look at the entire performance of the attorney and determine whether the defense attorney was competent and whether he sincerely tried to assist his client. In Dufour v. State, supra, at 310, we stated: "There are, however, certain basic duties required of an attorney when representing a criminal defendant."

Unless the stake or conduct was of such magnitude that the Court concludes the lawyer was incompetent or evidenced a failure to conscientiously fulfill his adversarial role, we will conclude the constitutional guaranty for performance of counsel as enunciated in Strickland has been met.

Admittedly, these criteria remain generalizations and subject to disagreement between lawyers and judges.

Nevertheless, the members of this Court have each had years to observe trial practice and procedure in this state, and each is able to pass judgment by studying a record to determine whether or not a particular attorney was both competent and had a responsible attitude in his client's defense of a lawsuit in this state.

Indeed, by studying a trial record an appellate judge cannot escape forming an opinion on the performance of trial counsel. The record in this case, contrary to Johnson's assertion, clearly reveals he was represented by competent counsel dedicated to his defense. We have again carefully reviewed the record, and our original view that he had competent, zealous counsel has been reinforced.

They most assuredly met the "reasonably effective assistance," and "wide range of professionally competent assistance," guidelines of Strickland. There clearly was no lack of competence, or failure of interest in their defense of Johnson to support the contention that the constitutional guaranty was not met.

III.

REFUSED MOTION FOR CONTINUANCE

For example, Johnson charges his counsel failed to properly move for a continuance, thereby depriving him of expert witnesses, M. Dale Mute and Stephen B. Halligan. These experts examined Johnson's and the other participants' homicide clothing, and studied the laboratory reports of the

state and Federal Bureau of Investigation. We have reviewed their letter to Diaz, Johnson's trial defense counsel, dated August 23, 1982, and we find nothing in this report which compels us to conclude that the defense counsel erred in not having these witnesses present at trial. These experts did not reach a conclusion so at odds with the state's proof so as to seriously challenge Johnson's guilt. Thus their absence from trial does not appear prejudicial.

It is just as plausible that their testimony would have been weak, and upon cross-examination their testimony would have helped the state's case. On the direct appeal of this case, we suspected Johnson's counsel moved for a continuance as a tactical gesture -- not really expecting the court to grant it -- but hoping that the circuit judge's refusal to grant the continuance would be considered error on appeal. It is not an altogether unfamiliar tactic of defense counsel in criminal as well as civil cases to produce an appeal record cluttered with adverse rulings. Some occasionally stick on appeal. The temptation to use this tactic increases in inverse proportion to the weakness of counsel's case.

IV.

WITHHOLDING OBJECTIONS TO CLOSING ARGUMENT

Of like import is Johnson's claim that his trial counsel were ineffective because they asked the trial judge to permit them to withhold objections to the state's argument until its completion and outside the presence of the jury. This clearly was a tactical decision of counsel. They, of course, knew they had the right to object whenever an improper argument was made. The very fact they made this request to the court evinced an awareness this right. Rather than risk offending the jury by objecting during argument, they asked permission to withhold objection and make it outside the presence of the jury. We criticized this sort of practice

because when an improper argument was in fact made, it did not give the circuit judge the opportunity to correct it promptly upon objection by opposing counsel.

A conscious choice of trial strategy by defense counsel which proves unfortunate is not to be equated with incompetency. Roe v. State, 95 Wis.2d 226, 290 N.W.2d 192 (1980); State v. Baker, 287 S.E.2d 497 (W.Va. 1982). Moreover, in our original opinion we found that the state did not make a prejudicial argument.

V.

FAILURE TO RAISE INVALIDITY OF 1963 CONVICTION

Johnson's claim that his counsel were ineffective for failing to inquire into the invalidity of 1963 conviction ignores the fact that Johnson did not take the stand in the sentencing phase of his trial to assert his innocence of the New York conviction, overlooks Johnson's failure to assert his innocence in the pro se document he filed with this Court on direct appeal, and disregards his counsel's failure to assert it in his appeal to this Court or in his petition for certiorari before the U.S. Supreme Court. He filed no such petition urging us to consider this issue as an additional assignment of error to those filed by his counsel.

VI.

REMAINING INEFFECTIVE ASSIGNMENTS

The remaining complaints Johnson makes of his trial counsel are a litany of Monday morning quarterbacking, attempts to again litigate issues decided, and assertions outside the record. All these fall far short of demonstrating his counsel were not reasonably effective.

The record in this case reveals that two dedicated, assidious trial attorneys did the best they could to defend

Johnson. Had the facts which pointed to Johnson's guilt not been overwhelming, his attorneys, no doubt, would have fared much better. In addition, the circuit judge, a jurist renowned for his patience, kindness and forbearance, more than lived up to his reputation in trying this case. No practicing attorney could hope for more consideration from a trial judge than these attorneys received in this case.

It is true we criticized defense counsel in our decision affirming Johnson's conviction for their manner of requesting a continuance, and by their request to withhold objections to the state's closing argument until its conclusion. But there was nothing about our comments to intimate that they harmed Johnson in doing so. To hold that Johnson's trial counsel, in this case, from this record, lacked that degree of competency guaranteed by the Sixth Amendment would make the Sixth Amendment virtually impossibile to abide by. No rational mind can conceive of such a proscriptive constitutional requirement as a condition precedent to the validity of a criminal conviction.

The jury in this case believed that Johnson stabbed a highway patrolman in the back and instructed another to shoot him with the patrolman's own gun. Their verdict was supported by overwhelming evidence. This officer was carrying out his duty in a peaceful manner, and posed no physical threat to Johnson or any of his companions. Civilized society depends upon peace officers for its survival. Such a murder can be equated with treason.

In his motion for post-conviction relief, Johnson asserts assignments XII, XVIII and XXIII which he failed to raise at trial or on the direct appeal. Having failed to raise them at trial or upon appeal, Johnson waived his right to assert them in his motion for post-conviction relief. Miss. Code Ann. § 99-39-21 (Supp. 1985); Irving v. State, 498 So.2d 305, 311 Miss. 1986); Mann v. State, 490 So.2d 910, 911

(Miss. 1986); Evans v. State, 485 So.2d 276, 280 (Miss. 1986); Dufour v. State, 483 So.2d 307, 308 (Miss. 1985).

Johnson also asserts assignments III, IV, V, VI, VIII, IX, XI, XIII, XVI, XVII, XIX, XXI, XXII, XXIV and XXV, which were considered and addressed by us on the direct appeal of his case. Consequently, these assignments are res judicata and cannot be raised again. Miss. Code Ann. § 99-39-21 (Supp. 1985); Irving v. State, supra; Evans v. State, supra.

DENIED AND WEDNESDAY, JULY 22, 1987, IS SET AS THE DATE FOR EXECUTION OF THE SENTENCE AND INFLICTION OF THE DEATH PENALTY IN THE MANNER PRESCRIBED BY LAW.

WALKER, C.J., ROY NOBLE LEE, P.J., [illegible] DAN LEE, ANDERSON AND GRIFFIN, JJ., CONCUR. ROBERTSON, PRATHER, AND SULLIVAN, JJ., DISSENT.

DECIDED MAY 27 1987

IN THE SUPREME COURT OF MISSISSIPPI

NO. DP-43

SAMUEL BICE JOHNSON

V.

STATE OF MISSISSIPPI

ROBERTSON, JUSTICE, DISSENTING:

I.

In a question begging opinion considering a point of first impression in the administration of this state's capital sentencing system, the majority today denies Samuel Bice Johnson post-conviction relief. It does so contrary to reason and fairness. With respect for my colleagues, I dissent.

II.

The point arises from the order of the Court of Appeals of New York dated March 24, 1987, in which that court vacated and held for naught Johnson's April 9, 1963, conviction of assault, second degree with intent to commit rape, first degree rendered by the Monroe County Court of New York. We may take it that Johnson's 1963 conviction as of the moment is absolutely void and of no further force and effect. Our review of Johnson's capital murder trial in this state reflects that the 1963 conviction was proved by the prosecution and successfully -- and argued vigorously -- as an aggravating circumstance, compelling the conclusion that Johnson should be given the death sentence. Miss. Code Ann. §99-19-101(5)(b) (Supp.1986). The jury in fact found this as one of the aggravating circumstances, to-wit:

> That the defendant, Samuel Johnson, was previously convicted of a felony involving the use or threat of violence to the person of another.

Today, that prior conviction having been declared a legal nullity, the majority begins by holding Johnson's claim "procedurally barred," adding yet another dubious chapter to this Court's recent and illicit romance[1] with procedural bars. The majority's point, as I understand it, is that, by waiting until after his 1963 conviction had been vacated before asserting any claim for relief, Johnson waived any rights he may have had in the premises .

To my mind, the opposite conclusion follows. Johnson had no basis for the claim he asserts until he obtained the order of March 27, 1987, vacating his 1963 New York conviction. Had he raised the point prior to March 24, 1987, we would no doubt have dismissed it out of hand and, consistent with the temper of the time, would probably now hold the claim barred by res judicata.

In our only consideration heretofore of the procedure by which today's point ought be raised, Phillips v. State, 421 So.2d 476, 482-83 (Miss.1982), we held that

> [T]he proper challenge to such a defective conviction lies in a separate action brought expressly for that purpose.

421 So.2d at 482.

Phillips arose in the context of an attack upon a prior conviction which had been used for enhancement of sentence under our habitual offender statute. Miss. Code Ann. §99-19-81 (Supp.1982). The Court held that a defective conviction was voidable, not void, and declared further that until such time as the conviction was judicially vacated in a separate proceeding, it could be used for habitual offender purposes. The Court then repeated that, rather than raising the point at the sentencing phase of the habitual offender action, the defendant's remedy was a separate post-conviction

[1] My view of the seamier side of this romance appears in Evans v. State, 441 So.2d 520, 531-33 (Miss.1983) (Robertson, J., dissenting) and need not be repeated here. See also Wheat v. Thigpen, 793 F.2d 621, 626-27 n.5 (5th Cir.1986).

action which, if successful, would no doubt then be the occasion for relief from his sentence as a habitual offender. Phillips, 421 So.2d at 483. The same rationale applies here.

III.

The majority next states that Johnson's death sentence should not be disturbed because, even should the prior conviction aggravating circumstance be eliminated, the jury found two other aggravating circumstances which remain undisturbed.[2] The majority then misreads Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). Stephens considers only the federal constitutional question. It holds a death sentence not constitutionally infirm by reason of the invalidity of one of several statutory aggravating circumstances found by a jury. The majority's citation to Stephens begs today's question, for we are confronted with whether as a matter of state law the vitiation of one of the aggravating circumstances found by the jury affords Johnson relief from his death sentence and, if so, what form that relief should take. Stephens merely sets minimal constitutional limitations and addresses in no way the question we ought to confront today.

IV.

One more point need be made before proceeding to the merits of today's state law question. The majority takes a swipe at the New York action suggesting that the Court of Appeals' March 24, 1987, order should be given less than full faith and credit. We are told that the March 24, 1987, proceedings were "less than adversarial." The point is disingenuous. For starters, I wonder if we would apply this approach in the converse situation. Where prior convictions have resulted from guilty pleas, would we say that those

[2] One of these is the highly problematic "the capital murder was especially heinous, atrocious and cruel." See Wiley v. State, 484 So.2d 339, 358-60(Miss.1986) (Robertson, J., concurring) and Jones v. State, ___ So.2d ___, ___ (Miss.No.Dp-60, dec. Jan.28,1987) (Robertson, J., concurring) (not yet reported).

proceedings were l s than adversarial and therefore give no credit to those conviction as aggravating circumstances. I think not. Further, I am confident the New York Court has displayed no greater penchant for vacating 25-year-old convictions than has this Court. Both pre- and post-Cardozo, the Court of Appeals of New York has enjoyed a reputation as one of the nations premiere state courts. I am not for a moment prepared in indulge in the cynical assumption that the New York Court did less than its duty when it ordered Johnson's 1963 conviction vacated.

V.

These things said, we confront a novel question. Where a previous conviction is proved as an aggravating circumstance, Miss. Code Ann. §99-19-101(5)(b) (Supp.1986), what is the impact upon a subsequent death sentence where thereafter the "aggravating" prior conviction is vacated?[3]

The point has been addressed, albeit obliquely, in two arguably analogous contexts. First, as indicated above, there is the case of Mississippi's habitual offender statutes. Miss. Code Ann. §§99-19-81 and -83 (Supp.1986). The Phillips case discussed above considered an attack upon one of the two prior convictions which had been relied upon by the prosecution in seeking enhanced punishment. Phillips makes clear that the fact that the prior conviction is under attack affords the defendant no relief. The logic of the opinion, however, is quite unmistakable: should the prior conviction ultimately be set aside, the defendant would then be entitled to relief from his enhanced sentence.

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[3]THe point was before us in West v. State, 463 So.2d 1048 (Miss.1985). At the sentencing phase of West's trial, the prosecution had proved as aggravating circumstances two prior murder convictions in Georgia appeals from which were then pending. After West had been sentenced to die in Mississippi, the Georgia convictions were reversed. West v. State, 252 Ga. 156, 313 S.E.2d 67 (1984). We subsequently reversed West's conviction and sentence by reason of error in the guilt phase of his trial and, thus, never reached today's point which would have affected only the sentencing phase.

No resort t a harmless error analysis would be made in such case, for pr of of the prior convictions under Section 99-19-81 or 99-19-83, as the case may be, automatically results in enhanced punishment. Assuming vacation of a prior conviction leaves the defendant with only one prior conviction within the meaning of the habitual offender statutes, it would follow as a matter of law that the defendant would be entitled to have his sentence reduced to that provided for the underlying offense without enhancement. Phillips, therefore, suggests that Johnson may be entitled to relief from his death sentence.

On the other hand, as a matter of the law of evidence, we have for years held that a defendant could be impeached by a prior felony conviction even though his previous conviction was at the time pending on appeal. And, to be sure, Nicholson v. State, 254 So.2d 881, 883-84 (Miss.1971) finds no error in allowing such impeachment, even though the prior conviction is later reversed.[4] 254 So.2d at 884. One may search the Nicholson opinion in vain for any reason why this result should obtain. The mere fact that a defendant's conviction of a previous offense is treated as final, though on appeal, begs the question of the effect to be given that prior conviction should it be reversed. Nicholson makes quite clear that

> after the conviction has been reversed it
> cannot be used for impeachment purposes
> until the defendant is again convicted.

254 So.2d 884.

It would seem to follow upon ordinary reasoning that the reversal of the impeaching prior conviction should have the same effect on a pre-reversal trial.

My thought regarding the impeachment via conviction on appeal issue is that the prosecution, or any other party so

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[4]The majority's citations to Young v. State, 425 So.2d 1022 (Miss.1983) and Milstid v. State, 347 So.2d 1319 (Miss. 1977) are without force or effect, for in neither of those cases had there been a reversal or vacation of the prior conviction used for impeachment.

using such a prior conviction, proceeds at its own risk. If the prior conviction on appeal should remain undisturbed -- and that is certainly what happens in the overwhelming majority of cases, there is no infirmity in any new conviction. Where, however, the Nicholson situation arises, that is, where the impeachment conviction is later reversed, the structure of the argument would seem to become one of whether the harmless error rule applies. I have come to prefer a recent articulation of that rule, i.e., does the error at trial undermine confidence in the outcome? See Malone v. State, 486 So.2d 367, 368 (Miss.1986).

In one sense the case at bar falls between the habitual offender situation considered in Phillips and the impeachment context of Nicholson. The prior conviction is certain to have an adverse impact upon one tried under the habitual offender statute. The impact of a prior conviction in an impeachment context is far more problematic. In the case at bar, we simply have no way of ascertaining with confidence whether the prior conviction was a significant factor in the jury's determination that Johnson should suffer the penalty of death. The jury was instructed at the penalty phase trial that the prior conviction was one aggravating circumstance it could consider. The prosecuting attorneys certainly argued that this aggravating circumstance was one that merited the death penalty. The "age" on the 1963 conviction could cut either way. On the one hand, the jury might have considered it remote and therefore given it little credit. On the other hand, the fact that Johnson had been involved in a violent crime in 1963 may have led others rationally to perceive that his penchant for violence had spanned two decades, his behavior beyond correction or reformation. We simply don't know.

Because of these uncertainties -- and in the context of the fact that Samuel Bice Johnson's life is at stake -- the majority quite correctly eschews rejection of Johnson's claim

on a harmless error basis. Such is consistent with the numerous cases wherein we recognize that sentences of death are qualitatively different in severity from any other that the defendant is to be given the benefit of the doubt when questions of prejudicial impact arise. See, e.g., Fisher v. State, 481 So.2d 203, 211 (Miss.1985); Jones v. State, 461 So.2d 686, 690 (Miss.1984); Billiot v. State, 454 So.2d 445, 455 (Miss. 1984); Neal v. State, 451 So.2d 743, 750 (Miss.1984); Williams v. State, 445 So.2d 798, 810-11 (Miss.1984); Laney v. State, 421 So.2d 1216, 1217 (Miss.1982); Irving v. State, 361 So.2d 1360, 1363 (Miss.1978). The majority manages, nevertheless, to deny Johnson's petition.

VI.

These things said, in my view Johnson is entitled to relief. He has presented this Court with a certified copy of the order of the Court of Appeals of New York of March 24, 1987, sufficient that we should hold that as a matter of law that he has proved the factual basis of his post-conviction claim. Past that, the effect of the vitiation of his 1963 conviction as a matter of law for the reasons set forth above, I would hold that vitiation of Johnson's 1963 New York conviction undermines confidence in the outcome of the penalty phase of his capital murder trial. I do not see how in candor the contrary may be contended. Accordingly, I would vacate the sentence of death imposed upon Johnson and restore the case to the active docket of the Circuit Court for a new trial on the question of sentence only.

PRATHER AND SULLIVAN, JJ., JOIN IN THIS OPINION.

SUPREME COURT OF MISSISSIPPI

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WEDNESDAY, JULY 15, 1987 :

SAMUEL BICE JOHNSON

DP-843 v.

STATE OF MISSISSIPPI

This cause came on to be heard on Petition for Rehearing of denial of Appellant's Petition for Leave to File Motion for Post-Conviction Relief on May 27, 1987, and this Court having considered the same is of the opinion that the same should be denied and same is hereby denied as ordered the 14th day of July, 1987, and entered this the 15th day of July, 1987.

ATTEST
A True Copy
This the 15th day of July, 1987
SUE GORDON, CLERK
SUPREME COURT OF MISSISSIPPI
By

Therefore, this Court is compelled to address this plain error in the sentencing order. Mississippi Supreme Court Rule 6(b); *Payne v. State*, 462 So.2d 902 (Miss. 1984); *Glover v. State*, 419 So.2d 588 (Miss. 1982); *Burnett v. State*, 285 So.2d 783 (Miss.1973). It is clear that the state sought conviction and sentence of the defendant as a recidivist. Only the quantity of time is in doubt, and the indictment clearly notices the defendant that the state was seeking only a seven year term. The defendant was wrongfully sentenced under section 99-19-83 to life imprisonment. This plain error is of constitutional dimensions.

This Court therefore reverses the sentencing portion of this case and remands to the trial court for resentencing to no more than seven years imprisonment without eligibility for parole or probation.

II.

The second assigned error here is ineffective assistance of counsel at both the trial and appellate stages. The allegations address the failure of defense counsel to object to alleged improper evidence in the sentencing phase and to challenge the imposition of a life sentence on appeal. All alleged allegations of ineffectiveness address the sentence enhancement portion of the defendant's trial.

[7] Since under the first assignment of error, this Court noted plain error and is remanding for proper sentencing under the statute applicable of section 99-19-81 (Supp.1984), the ineffectiveness issue on this ground has now become moot. *Read*, supra.

REMANDED FOR RESENTENCING NOT INCONSISTENT WITH THIS OPINION.

PATTERSON, C.J., WALKER and ROY NOBLE LEE, P. JJ., and HAWKINS, DAN M. LEE, ROBERTSON and SULLIVAN, JJ., concur.

Samuel JOHNSON, a/k/a Samuel Bice Johnson

v.

STATE of Mississippi.

No. 55265.

Supreme Court of Mississippi.

May 8, 1985.

Rehearing Denied Nov. 6, 1985.

Defendant was convicted in the Circuit Court, Pike County, L.D. Pittman, J., of capital murder of highway patrolman, was sentenced to death, and he appealed. The Supreme Court, Hawkins, J., held that: (1) overwhelming weight of evidence supported defendant's conviction; (2) defense counsel's motion for continuance filed on date trial was to begin contained none of the essential ingredients required under statute to justify continuance of the cause; and (3) life sentences of codefendants were not "relevant mitigating circumstances" in sentencing defendant. The Supreme Court, Roy Noble Lee, P.J., in part B held that trial court's refusal to instruct jury on their option to recommend life sentence even if aggravating circumstances were found to outweigh mitigation was not reversible error.

Affirmed as to guilt phase, affirmed as to sentencing phase.

Hawkins, J., filed opinion dissenting to Part B.

See also, 449 So.2d 225.

1. **Homicide** ⇐250

Overwhelming weight of evidence supported defendant's conviction for capital murder of highway patrolman.

2. **Criminal Law** ⇐711

State and defense counsel should be given wide latitude in their arguments to jury.

3. Criminal Law ⇐711

Court should be very careful in limiting free play of ideas, imagery, and personalities of counsel in their argument to jury.

4. Criminal Law ⇐728(2, 5)

It is duty of trial counsel, if he deems opposing counsel overstepping wide range of authorized argument, to promptly make objections and insist upon a ruling by trial court.

5. Criminal Law ⇐867

If argument is improper, and objection thereto sustained, it is duty of trial counsel to move for mistrial.

6. Criminal Law ⇐730(1)

Trial court is in best position to weigh consequences of objectionable argument, and unless serious and irreparable damage has been done, admonish jury then and there to disregard improper comment.

7. Criminal Law ⇐1171.1(3)

Defendant's conviction for capital murder could not be reversed on basis of prosecutorial misconduct in closing argument, where every one of defendant's complaints thereto could have been quickly dissipated by a contemporaneous objection and ruling by trial judge, but instead, defendant's trial counsel waited until conclusion of argument to object.

8. Criminal Law ⇐603(2)

Defense counsel's motion for continuance filed on date capital murder trial was to begin contained none of the essential ingredients required under statute to justify continuance of the cause. Code 1972, § 99-15-29.

9. Criminal Law ⇐632(4)

Trial court properly sustained motion in limine to prevent witness from testifying to fact that murdered highway patrolman had previously killed a black man, as that fact had no relevancy to defendant's capital murder prosecution.

10. Homicide ⇐308(1)

Trial court's instruction was proper regarding requirements of murder and capital murder, as acts necessary to come within capital murder framework were clearly defined, jury could not have been misled by instruction, and defense counsel approved the instruction. Code 1972, § 97-3-19(1)(a), (2)(a).

11. Criminal Law ⇐986.2(6)

While it is sole responsibility of trial court to sentence each accused who has been convicted or pleaded guilty, it is not improper for trial court to take into consideration in its sentencing that such person is cooperating with, and will be a witness for state in prosecution of other defendants.

12. Criminal Law ⇐691

If defense counsel under some unusual case wishes to withhold from jury fact that coindictee testifying for state has pleaded guilty and received a lesser sentence, he has duty to object to the testimony offered by state.

13. Criminal Law ⇐1036.2

Defendant could not complain on appeal of State's questioning of his witness bringing out that witness had pled guilty and had been sentenced to 25 years for his part in murder of highway patrolman, as defendant said nothing at trial, and complained for first time in posttrial proceedings regarding admission of such evidence.

14. Homicide ⇐305

Defendant on trial for capital murder of highway patrolman was not entitled to have jury separately instructed to consider whether he was guilty of being an accessory after the fact.

15. Witnesses ⇐6

State of Mississippi is without authority to compel attendance of out-of-state defense witnesses in a criminal case.

16. Witnesses ⇐2(1)

Under Mississippi Constitution, an accused is entitled to compulsory process for witnesses in his favor; but state's only power is to reach witnesses within the state. Const. § 26.

17. Costs ⇐302.2(1)

In prosecution for capital murder of highway patrolman, trial court did not err in denying defendant funds for out-of-state witnesses, as trial court was only presented with a summary by defense counsel, not sworn to, as to what these witnesses might testify.

18. Criminal Law ⇐1171.1(6)

No reversible error was committed in statement made by prosecution during argument, notwithstanding murder defendant's contention that State led jury to believe that if he were sentenced to life, he would eventually be paroled.

19. Criminal Law ⇐1134(3)

It is duty of Mississippi Supreme Court under statute as well as United States Constitution to review proportionality of every death sentence. Code 1972, § 99-19-101(5)(b); U.S.C.A. Const.Amend. 8.

20. Homicide ⇐354

Jury was warranted in believing defendant an active participant, if indeed not the leader, in deliberate, brutal slaying of highway patrolman carrying out his duties, and thus jury could properly return death penalty.

21. Homicide ⇐7

"Murder" embraces within its meaning cruelty, brutality, and an evil intent carried to the ultimate in harm: death.

See publication Words and Phrases for other judicial constructions and definitions.

22. Homicide ⇐354

Murder of a police officer in line of duty must be equated with treason or espionage in time of war; such crime warrants most severe punishment society exacts.

23. Homicide ⇐354

In prosecution for capital murder of highway patrolman, defendant was entitled to have trial jury consider any relevant mitigating circumstances.

24. Homicide ⇐354

Life sentences of codefendants were not "relevant mitigating circumstances" in sentencing defendant for capital murder of police officer.

See publication Words and Phrases for other judicial constructions and definitions.

25. Homicide ⇐354

Statute authorizing sentencing jury to consider as an aggravating circumstance that capital murder defendant was previously convicted of felony involving the use or threat of violence to the person fulfilled guidelines of United States Supreme Court's *Zant* decision. Code 1972, § 99-19-101(5)(b).

26. Courts ⇐509

It is not the purpose of federal appellate review to deny to states the authority to and responsibility for determining aggravating circumstances which justify death penalty.

27. Constitutional Law ⇐70.1(10)

It is not function of Mississippi Supreme Court to curtail authority of legislature for determining aggravating circumstances which justify death penalty.

28. Homicide ⇐354

Legislature had power and lawful authority to include fact that defendant was previously convicted of felony involving use or threat of violence to person as aggravating circumstance in prosecution for capital murder regardless of remoteness of prior conviction. Code 1972, § 99-19-101(5)(b).

29. Criminal Law ⇐1171.8(1)

Admission, in rebuttal, at guilt phase of trial, of conversation between defendant and cellmate/coindictee regarding defendant's use of knife to kill highway patrolman was not reversible error on ground that prosecutor deliberately violated trial court suppression order, as conversation was not embraced in any discovery motion or discovery order.

30. Criminal Law ⇐685(1)

Permitting officer of court to remain in courtroom during trial at which he may be testifying is discretionary with trial court.

31. Crimi. Law ⇐637

Capital murder defendant was not brought into courtroom in presence of jury in handcuffs so as to prejudice his defense.

32. Criminal Law ⇐432

In prosecution for capital murder of highway patrolman, trial court properly permitted introduction into evidence of checks found in certain automobile, after ruling that they could only be referred to as "documents," as these documents were not circulated to jury, and as they were referred to by fingerprint expert as having defendant's fingerprints.

33. Criminal Law ⇐1115(1)

In prosecution for capital murder of highway patrolman, record did not support defendant's contention that State failed to provide him with counsel in initial appearance hearing.

34. Jury ⇐108

In prosecution for capital murder of highway patrolman, trial court did not err in excluding jurors who clearly had fixed conscientious scruples against infliction of death penalty.

35. Criminal Law ⇐1213.8(8)

Administration of death penalty was not arbitrary and discriminatory in violation of murder defendant's Eighth and Fourth Amendment rights under United States Constitution. U.S.C.A. Const. Amends. 4, 8.

36. Homicide ⇐341

Trial court's refusal to instruct jury on their option to recommend life sentence even if aggravating circumstances were found to outweigh mitigation in prosecution of defendant for capital murder of highway patrolman was not reversible error.

Kenneth J. Rose, Jackson, for appellant.

Edwin Lloyd Pittman, Atty. Gen. by William S. Boyd, III and Marvin L. White, Jr., Sp. Asst. Attys. Gen., Jackson, Bob Evans, Dist. Atty., Magee, for appellee.

En banc.

HAWKINS, Justice, for the Court:

On December 31, 1981, around two o'clock in the afternoon Mississippi Highway Safety Patrolman Billy M. Langham, while acting in line of duty, was murdered on U.S. Highway 49 in Covington County, at the city limits of Collins. He was stabbed with a butcher knife in the back between his shoulder blades, and shot at close range with his own revolver.

Samuel Bice Johnson, one of three men indicted for his murder, following a change of venue, was tried in the Circuit Court of Pike County for capital murder, sentenced to death, and has appealed. Two other men charged in the murder, Otis Lee Fairley and Charles Montgomery, Jr., following separate trials, have been convicted of capital murder, and each sentenced to life imprisonment.

We affirm.

There is no dispute but that Langham was murdered, but it was Johnson's contention at trial and on this appeal that the murderer was Anthony Fields, who constituted the fourth culprit there at the scene of trouble with Patrolman Langham. Johnson has raised numerous issues on his appeal, which we will address. First, the facts.

FACTS

Anthony Fields and Otis Lee Fairley are first cousins. On December 31, 1981, they were staying together in New Orleans. Around 10:00 that morning the two of them were picked up by Samuel Bice Johnson and Charles Montgomery, Jr., in a 1971 Ford LTD with a yellow body and brown top, Johnson driving.

Fields had seen, but never met Johnson or Montgomery prior to that morning. Montgomery rode on the front seat with Johnson with Fields on the left and Fairley on the right side of the back seat. Their destination was Collins. Fairley was born in Collins and lived there until 1968. Fields was born in Gulfport, where he lived for 15

years and then moved to New Orleans. The precise purpose of their trip to Collins is not shown in the record. Fields's mother lived in Collins, having moved there three years previously; Fairley had two sisters living there; and they both had numerous kinsmen there. Fields never lived in Collins.

En route they stopped in either Lumberton or Purvis where Fairley had a sister.

They were traveling North on Highway 49, presently four lanes with a strip between the North and South bound lanes. There are several low hills as the highway approaches Collins from the South.

At approximately 1:30 that afternoon, as they were approaching Collins, they passed Highway Patrolman Billy M. Langham, parked in a Dodge patrol car, with a blue light on top and Highway Safety Patrol decals on its sides. Langham was in uniform, wearing his badge, and armed with a .357 caliber magnum Smith and Wesson revolver.

As they passed the patrol car, Langham started after the Ford with his blue lights blinking. Johnson pulled his car over on the right shoulder and Langham parked the patrol car just a few feet to the rear. Langham walked to the driver's side of Johnson's car and asked to see Johnson's license. Johnson replied he had no license and Langham told him to get out of the car.

The state's version of what then transpired came primarily from Fields, who testified that after Johnson got out of the car Langham noticed a butcher knife on the front seat. Langham picked the knife up, put it on top of the patrol car next to the blue light, and told Johnson to go to the back of his car.

Langham then came back to the Ford car and told the other three he was going to have to search them. They also got out of the car, Langham patted all of them lightly and told them to stand by his car. Fields noticed Johnson whispering to Fairley.

Langham then went to the Ford and searched the front seat. The officer then started the search of the back seat. As he was in the process of searching the back seat, Fairley got the knife off the top of the patrol car and gave it to Johnson. Then, as the officer straightened up from searching the back seat, Johnson stabbed him in the back.

When Fields was asked on direct examination why Johnson would stab the officer, he replied it was to escape.

Fields further testified that when Johnson stabbed Langham, the officer reached for his revolver. He said Johnson then changed hands and went for the revolver, also, and the two started tussling, and Johnson kept on stabbing the officer. Johnson yelled to Fairley to "come knock him out," and after several calls Fairley suddenly ran over and started hitting Langham in the face. Johnson then yelled for Montgomery to get the officer's gun. Montgomery, who was then standing close by the scuffle, hesitated, and then suddenly reached and grabbed the gun. Montgomery then said, "I got it."

The scuffle began by the Ford and moved back towards the patrol car. The officer looked to Fields and said, "Help." Fields did nothing.

When Montgomery got the pistol, Johnson and Fairley both ran for the car. Montgomery remained standing there with the gun on the officer. Langham asked Montgomery, "Please don't shoot me." He asked this more than once.

Montgomery was holding the gun with both hands. He took one hand off to open the car door, and Johnson, who was under the steering wheel, told Montgomery, "No, shoot the m....f....." Montgomery hesitated, and Johnson repeated the statement.

Montgomery then put both hands on the pistol and started walking towards the officer. Fields, by this time in the back seat of the LTD, dropped his head so as not to see, and heard a shot. He then heard Montgomery say, "I got him," and Montgomery got into the car. As Johnson drove off Montgomery threw the gun out the window. The record does not reveal from

Fields ...dimony when he got back into the car.

Johnson cursed Montgomery for throwing the gun away, slowed the car down, but because there were witnesses approaching from behind, he did not stop.

As they were driving Johnson repeatedly said he had to find another car. He parked the Ford, and they all got out and ran for a railroad track. When they got on the track, they started walking towards town. Johnson removed the sweater he was wearing and threw it beside the track, which Fields described as brown. Johnson had no clothing under the sweater. Fairley removed his sweat suit to give Johnson his t-shirt, which Johnson put on.

They spotted a yellow Mercury Comet beside the track next to a building. Johnson inspected the car, found the keys were in it, and the four of them got into the car, Johnson driving.

Fairley got on the front seat with Johnson, and Montgomery and Fields got in the back. Johnson told Montgomery and Fields to lie down, which they did.

As they were traveling in the Comet, Johnson asked the others if they thought he did the wrong thing. Montgomery and Fairley said he did the right thing, and Johnson said he'd rather be dead than go back to jail.

The Comet ran a road block at the intersections of Highways 35 and 84 in Jeff Davis County. The officers on the scene shot the tires, and the Comet stopped. Fairley and Johnson ran from the car.

Fields got out with his hands up, and was arrested. Montgomery remained in the car and was arrested.

The officers pursued Johnson and Fairley on foot, and in a short distance caught and arrested them both.

Fields pleaded guilty to the crime of accessory after the fact and was sentenced to five years. He also received three 10-year sentences for guilty pleas to other crimes, two to run concurrent, one consecutively: a total of 25 years to serve. He testified as a witness for the State. He had no prior felony convictions. He had previously been charged with possession of ...eadly weapon, assault, and possession ...stolen property, and convicted of a misdemeanor, for which he served some time in jail.

On cross-examination Fields admitted to drinking on the way to Collins. The others smoked some marijuana. He said he stood by the front left tire of the patrol car while the scuffling was going on, and never touched Langham. He also testified that when he was questioned by an officer if Johnson did not pull the knife from his pocket he had answered "yes." He admitted he had forgotten to tell the officers about Johnson removing the sweater until some time later, and when he did recall the incident he told his lawyer.

He said the first time he saw the butcher knife was when the officer put it on top of the patrol car. Until then he was unaware Johnson had a knife. He also admitted telling the officers Johnson had a coat on, but said Johnson had the coat on after Montgomery gave it to him.

For purposes of clarity in this opinion, we have given the testimony of Fields first, although he was the last person who testified in the case in chief for the State. We relate the remainder of the facts as told by the State's witnesses.

Andy Wade, a 12- or 13-year-old boy, was riding North on the highway and noticed passing a patrol car parked behind a yellow car, and a patrolman apparently searching the back seat area of the yellow car.

Andy Cochran and his niece, Mrs. Brenda Townsend Watson, wife of a highway patrolman, were two of the occupants of a car traveling South on the highway. They noticed the blue lights on the patrol car, slowed down, and observed the yellow Ford parked in front of the patrol car. They also observed three black men tussling with the patrolman. They saw the officer break away, and being grabbed by the three men. They observed the officer's arm being held behind his back, and blood between his shoulders running down his shirt. Three men were involved in the

tussling. Mrs. Watson saw the officer being pushed down the embankment. They proceeded South to a place where they could cross over into the North-bound lane of the highway, observing the affray as best they could. By the time they had turned around and got back to the scene, the yellow Ford had driven off. Cochran identified the yellow car as a Ford LTD. Cochran briefly examined the slain officer, and took off after the yellow Ford. They saw a deputy sheriff and reported what had transpired. Neither Cochran nor Mrs. Watson was able to identify any of the individuals involved in the trouble. Mrs. Watson testified she did not see any person making an attempt to help the officer, or any person merely standing around, doing nothing.

Charles Dodds was driving North on the highway. As he approached the scene, he noticed at least three men pushing and shoving the patrolman between the cars and the right-hand ditch. At very first glance they appeared playful. He noticed one man with his arms around the patrolman. Dodds parked his car 60–75 yards from the scene. He noticed the patrolman either being pushed, or breaking away towards the ditch. He could not tell whether the scuffle was beside or in front of the patrol car. He noticed the patrolman taking about two steps towards the ditch as though trying to regain his balance. Either his back or side was to the men, and just as he finished his second step, another man, standing to the left of the man holding the officer, shot him.

Dodds reached and got his own gun and loaded it. By the time he raised up all but one of the men had got into the yellow car. He saw the last man getting in on the right hand side.

On cross-examination Dodds testified that at one time it appeared the men were almost in a straight row. He noticed one of the men was huskier than the others, and he observed this man holding the officer. Johnson was not husky. Dodds did not observe any of the blacks standing around doing nothing.

Charles Hollingsworth, a first lieutenant in the Army, a graduate in criminal justice from Mississippi Southern University, and a former police officer in Hattiesburg, was traveling North on the highway when he first observed at least two people at the right rear of the Ford fighting with the patrolman. It seemed to him one person was holding the patrolman and two more were hitting him.

He stopped his car some thirty to thirty-five feet from the Ford and continued to watch. He was about to get out of his car when he heard a shot. There was no fighting going on when he heard the shot. He saw no weapon. Just before the shot was fired, it appeared the patrolman had been pushed back five or ten feet from the others. When Hollingsworth heard the shot, he dropped to his car floorboard.

When he raised up he observed men getting into the Ford. He could only identify Anthony Fields. His testimony as to what he observed Fields doing is ambiguous. On cross-examination he testified as follows:

Q. Coming down 49 you saw what appeared to you to be a scuffle, is that right?

A. There was a fight going on, yes, sir, it was.

Q. And you have said previously that there were at least two people involved, is that right?

A. That is correct.

Q. You also said that there could have been more people involved, is that right?

A. That is correct.

Q. Did you see those people?

A. I saw at least two people.

Q. Did you see more than two people?

A. There could have been more than two people.

Q. Did you see any more people?

A. I at least saw two in the view that I had from my car.

Q. Didn't see anyone else other than those two, is that right?

A. They were the two I saw initially, that correct.

* * * * * *

Q. Did you tell Wade Parham in a telephone conversation that there could have been someone in the car?

A. I could have possibly said that. I don't remember saying it.

Q. But you're not denying it, is that correct?

A. I'd have to look at my testimony on my original statement.

Q. I hand you a copy of your transcript of the telephone conversation. I'd like to call your attention to—Mr. Parham asked you the question: "Did you see more than two blacks, Mr. Hollingsworth? And you said, 'There were probably more than two but, you know, I only noticed two. There could have been more out of the car and there could have been one guy that was still driving? Did you say that?

A. It's in the statement. I guess I did say it.

Q. Thank you, sir. When you first saw those people if there was a scuffle, the scuffle had already—if there was a stabbing that stabbing would have already taken place, is that right?

A. I cannot answer that.

Q. Did you see anyone stab the Highway Patrolman?

A. No, I did not.

Q. Did you notice whether the Highway Patrolman was hurt?

A. At what point in time?

Q. When you first saw him?

A. When I originally saw him I could not tell.

Q. Did you see anyone stab the Highway Patrolman?

A. No, I did not.

Q. Did you see anyone shoot the Highway Patrolman?

A. No, I did not.

Q. But you heard the shot, didn't you?

A. Yes, I did.

Q. Okay. Backing up just a short piece in time, when you stopped after you saw the scuffle you saw only two people, correct?

A. That's what I had in my statement, yes.

Q. Had there been more people out there they could have already gotten back in the car, is that correct?

A. That is a possibility.

Q. Okay. And you were able to identify one of those two people, weren't you?

A. Yes, I did.

Q. Tell the people of the Jury who that man was?

A. I do not recall what his name was.

Q. Was it Anthony Fields?

A. I believe it was.

Q. Are you not certain?

A. I know I identified him; I don't remember what his name was.

Q. Would you like me to help you with your statement? It was Anthony Fields, wasn't it, and you identified him?

A. Yes, it was.

Q. He's the man that turned State's evidence, is that correct?

A. I believe so.

Q. You said he was a big one, he was husky, correct?

A. I believe I said that, yes.

Q. And you saw two people and then you heard the shot, is that right?

A. That's correct.

Q. Was Mr. Fields trying to help that police officer?

A. I don't know.

Q. He was fighting with that police officer, wasn't he?

A. He was one of the men I identified. I could not tell.

Q. You told the District Attorney's office that they were fighting with that police officer, didn't you?

A. Yes, I did.

Q. You did? So he was fighting with him, wasn't he?

A. I don't know if Mr. Fields was fighting with him, but I know—

Q. [INTERRUPTING] What about the two men you saw, were they fighting or just—

BY MR. EVANS:

If the Court please, I request that he be allowed to finish his answer before he asks another question.

BY THE COURT:

Yes. Let him finish his answer and then you may ask another question.

BY MR. DIAZ:

I beg the Court's indulgence.

A. Would you repeat the question, please?

Q. In your previous statement you said that you saw two black men, is that right?

A. That's correct.

Q. And you told in your statement that those two men were fighting with the Highway Patrolman? Is that correct?

A. That's correct.

Q. And you identified one of those two men as Anthony Fields, didn't you?

A. I identified one of the men that I could recognize as Anthony Fields, that's correct.

Q. He was one of the men fighting with the Highway Patrolman, wasn't he?

A. He could have been, yes.

Q. Okay. The man sitting right over there in the green suit, is he the other man?

A. I don't know.

Q. Take a good look at him.

A. I said I don't know. This all happened in a matter of some ten or fifteen seconds.

Q. Okay. To be certain that there's no confusion, this is not the man you identified, is it?

A. No, it is not.

Q. The man you identified was heavyset and known to be Anthony Fields, correct?

A. That is correct.

[Vol. VIII, pp. 1319–1324]

Bennie Sasser was the final disinterested eyewitness for the State. He was a resident of Covington County, and traveling North on the highway. As he approached the parked vehicles, he noticed something unusual. He observed the patrolman jerk his arm up suddenly and that he was being hit in the back. He then testified [Vol. VIII, pp. 1326–27]:

> There were three, possibly four black men standing out there, and one black man was shorter and heavier-set that was doing the hitting in the back of the Patrolman. Then I observed the Patrolman got away from them, was pushed or something and he ran down the embankment, and about this time I was having to dodge a pickup that was in front of me, and I looked back and he was running back toward them. And as I swerved back around then I noticed that they were getting in their car, the car doors were open, and that's the last time I saw them . . . .

On cross-examination he testified that the husky man he observed hitting the officer in the back was not Johnson. He said it was possible that the man hitting the officer in the back could have been stabbing him.

The postmortem by Thomas Glen Puckett, Hattiesburg pathologist, revealed three wounds: a cut to the bone over the left eye and cheekbone; a 2–2½ inch long, 7–8 inch deep stab wound to the back below the shoulder blades extending into the lung cavity; and a stellate entrance gunshot wound about the level of the left eyebrow. This type of wound was indicative of a weapon being fired at such close range that the gases from the discharging weapon also entered the victim. Langham's right eye was bulged out markedly as a result of gas from the weapon. The bullet traveled through the brain and lodged between the right rear exterior of the brain and skull.

The doctor testified that Langham was killed by the gunshot wound. He further testified that the stab wound, while serious, might not have been fatal, particularly if Langham could have received reasonably prompt medical attention; but on the other

hand could have resulted in death within ten minutes.

Ballistics tests revealed the bullet removed from Langham's skull was fired by his own .357 caliber magnum revolver. This revolver and the butcher knife were found at the scene of the slaying. No fingerprints were recovered from either weapon. also, tests for powder residue from a discharged firearm were negative as to all four: Johnson, Montgomery, Fairley and Fields.

Following their arrest Johnson was observed as having a bad cut on his right palm, for which he received medical treatment.

Tests showed the bloodstains on the knife were Langham's. Also, bloodstains on various parts of the exterior of the yellow Ford were determined to be Langham's. Other stains were found to be blood, but the expert was unable to identify the precise type.

The sweater, which Fields called brown, and identified by all witnesses at trial as being white, was found by Lawrence Anderson, assistant chief of police of Collins, just off the railroad tracks in the area where Fields testified it had been thrown. Tests showed the bloodstains on the body of the sweater came from Langham, and bloodstains on the sleeve came from Johnson.

On clothing identified as belonging to Montgomery tests showed bloodstains of Langham.

No bloodstains were found on Fields's clothing.

Bloodstains were found on Fairley's clothing but not identified.

All the bloodstains on Johnson's clothing were of his own type.

Joe E. Andrews, Jr., an expert on hair and fiber identification employed by the Mississippi Crime Lab, testified there are three basic fibers: animal, plant and synthetic. From his examination of Johnson's clothing, he found gold synthetic fibers with the same characteristics as found on the sweater. Also, from an examination of Montgomery's clothing, he found gold synthetic fibers with the same characteristics as on the sweater. It is not clear from the record whether these fibers found on the sweater and Johnson's and Montgomery's clothing were part of the fabric of the sweater, or simply fibers that had become attached to the sweater. On cross-examination Andrews conceded it was possible that all three of these gold synthetic fibers could have come from some common source other than the sweater.

No such fibers were found on either Fairley's or Field's clothing, nor on Langham's clothing.

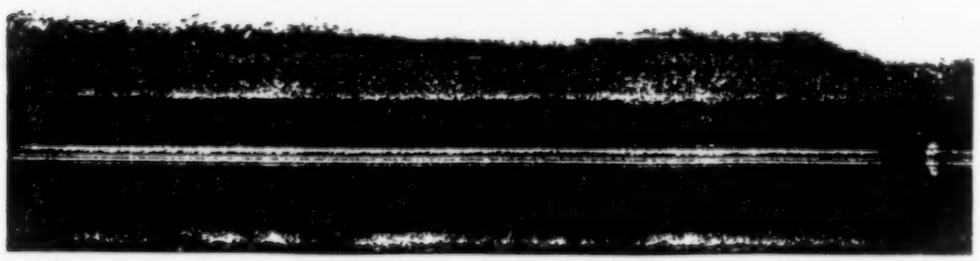
Johnson did not testify. The only eyewitness testifying in Johnson's behalf was Fairley, who gave an entirely different version of the affray.

Fairley testified that after Johnson stopped the car, Langham came over to the driver's side of the car and asked Johnson if he had a driver's license, and when Johnson replied "no," the officer told him to step to the back. He said the officer then came around to the passenger's side and asked Montgomery to get out, and step to the back of the car, following which the officer began searching the front passenger seat. After searching the front of the car, the officer told Fairley and Fields to get out of the car. He testified the officer did not find a butcher knife on the front seat of the car, and did not put a knife on top of the patrol car.

He said the officer told them to "stand to the back." (Vol. XI, p. 1889) Further, he stood at the front end of the patrol car, and the other three were there standing along the side, by the front of the patrol car.

Fairley said the officer had begun to search the back seat of the car and Fields walked up and stabbed him, and that the first time he ever saw the knife or had any knowledge of it was when Fields stabbed the officer.

Fairley said Johnson then ran up and grabbed for Fields, he guessed, and got cut, and that he then ran to the car. He testified that Johnson screamed and cursed



that he had got cut. Fairley said Montgomery came to the car next, and seconds later after Johnson got cut, he came to the car, also. He said Johnson tried to crank the car up and it wouldn't get started at first, but finally started, and then they heard a shot and Fields came to the car. Fairley said Fields had a white sweater on.

He did not know whether Johnson got the knife away from Fields or not, but the struggle lasted only seconds.

On direct examination Fairley testified he had been convicted of murder two times (apparently the last time was a conviction for Langham's murder), and twice for assaults, one with, and the other without malice.

On state cross-examination Fairley was asked the purpose of the trip to Collins, and the trial judge sustained the objection to this question.

Further, on cross-examination he testified when the officer was stabbed "we ran up to help the officer and that's when the struggle started. I ran to the car." He said his intention was to grab Fields and when Johnson screamed he ran to the car. He did not relate Montgomery as participating in the affray in any way, but when he ran back to the car Montgomery was there, also.

He said Fields held the officer, stabbed him and scared off the other three all by himself. And, Fields got in the car by the time Johnson got it started.

Further, on cross-examination Fairley said Fields gave Johnson directions to drive the yellow Ford, and they ended up down by the co-op and railroad track. He then testified Fields ran into the yellow Comet, and at this time Johnson and Montgomery were down the street. Fields got in the Comet and Fairley got in and they drove off to Johnson and Montgomery, who then got in. Fields drove just a short distance and said he was too nervous to drive, and asked Johnson to drive. He testified Johnson, with his hand bleeding, got out of the back seat and got in the front seat and started driving.

As to the white sweater which Fairley testified Fields was wearing, he said while they were on the tracks he asked Johnson and Montgomery to help him pull the sweater off. He could not remember how they pulled it off.

He said the reason the three of them did not grab Fields and overpower him was they were afraid, or had panicked.

He admitted that he had told his sister Rosa McCullen that Johnson stabbed the officer and Montgomery had shot him.

Dr. William Munn testified to treating two lacerations at the base of the thumb and little finger of Johnson's right hand, which had almost stopped bleeding at the time he was treating Johnson. Neither wound involved muscles or tendons. The doctor recalled stitches were put in one or the other of the wounds.

There were four jail house witnesses, two who testified for the defense, and two in rebuttal for the state. James Jenkins and Carl Lee testified that while they were in the Simpson County Jail they heard Fields admit to Fairley he had lied to save himself from going to the gas chamber.

Norman Shelly in rebuttal testified he heard Fairley and Johnson talk about Fairley taking the knife and Johnson stabbing the patrolman. Danny Russell in rebuttal testified Johnson asked him to say that Fields had lied and tricked the state.

PART A.

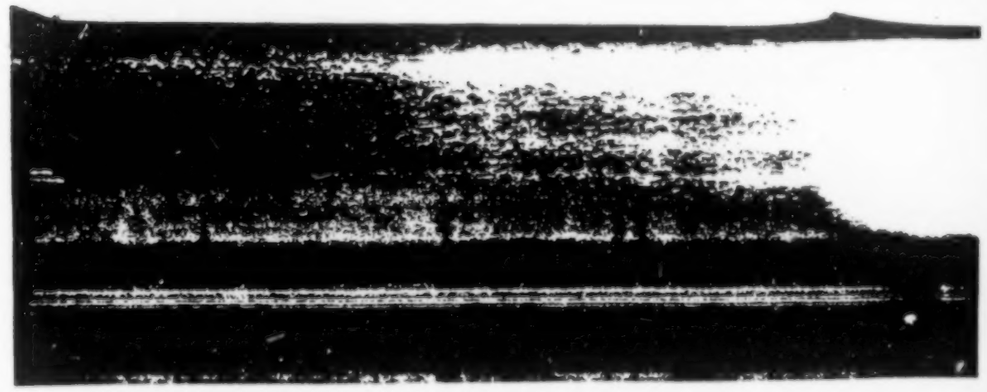
LAW

GUILT/INNOCENCE PHASE

I.

WEIGHT OF THE EVIDENCE

[1] Johnson's first contention is that the verdict of the jury is against the overwhelming weight of the evidence. Fields testified Johnson stabbed Langham and told Montgomery to shoot, drove the get away car, and led the group. Only Fairley disputed this, and he admitted that he had told his sister Johnson stabbed the officer



and Montgomery shot him. The credibility of these witnesses was for the jury. Disinterested eyewitnesses, who saw varying brief time frames of the affray, were not able to specifically identify Johnson as doing anything to the officer during their respective moments of observation, and two recalled Fields under circumstances which would indicate he may very well have been more than an idle spectator, as he testified. There again, it was for the jury to accept the portions of Fields's and Fairley's testimony they wished to believe or discredit. This Court has long held, as stated in *Cochran v. State*, 278 So.2d 451 (Miss.1973), citing *Wilson v. State*, 264 So.2d 828 (Miss.1972):

> In a criminal prosecution, the jury may accept testimony of some witnesses and reject that of others, it may accept in part and reject in part the testimony of any witness, or it may believe part of the evidence on behalf of the State and part of that for the accused. In other words, the credibility of witnesses is not for the reviewing court. *Bond v. State*, 249 Miss. 352, 162 So.2d 510 (1964).
>
> It was the function of the jury to pass upon the credibility of the witnesses and to resolve the issues. Since there was ample evidence, which if believed by the jury, justified the verdict, the verdict will not be disturbed on appeal. *Murphree v. State*, 228 So.2d 599 (Miss.1969). (264 So.2d at 830). [Other citations omitted]

See also: *Dickerson v. State*, 441 So.2d 536 (Miss.1983) at 538, citing *Gandy v. State*, 438 So.2d 279, 285 (Miss.1983); *Pearson v. State*, 428 So.2d 1361, 1364 (Miss.1983); and *Gathright v. State*, 380 So.2d 1276, 1278 (Miss.1980).

Significant is the testimony that both Johnson's and Langham's bloodstains were found on the sweater. Langham's bloodstains were found on Montgomery's clothing, and unidentified bloodstains were found on Fairley's clothing, but no bloodstains were found on Fields's clothing. Also, synthetic fibers from a common source were found on the sweater, Johnson's clothing and Montgomery's clothing. None was found on Fields's clothing.

The evidence for the jury was not limited to the co-indictee Fields. His testimony was corroborated by the bloodstain and fiber tests. Further, the only witness who directly disputed Fields was Fairley, and from this record his testimony is not convincing. Moreover, Fairley admitted telling his sister that Johnson stabbed, and Montgomery shot the officer. Johnson was indicted for capital murder in the death of a patrolman acting in his official capacity, with knowledge he was a police officer acting in his official capacity, in violation of Miss.Code Ann. § 97-3-19(2)(a).

There was a clear jury issue on Johnson's guilt, and we are not at liberty to disturb it.

II.

IMPROPER CLOSING ARGUMENT

Johnson contends there was prosecutorial misconduct in the closing argument. The district attorney made the opening and rebuttal arguments for the state. Johnson's two trial attorneys each made closing arguments in his behalf.

Prior to the circuit judge instructing the jury, defense counsel asked the court to permit them to delay making objections to closing argument until the state had concluded, and make such objections outside the jury's presence, so as not to interrupt the argument. Defense counsel also warned that they might object, in any event, "if something gets out of hand." The record reveals the following (Vol. XII, p. 1984):

> BY MR. HARPER:
>
> And, Your Honor, one other thing too, rather that—I don't know if we are going to want to make objections during the closing. What I'd like to do is, so that we not interrupt, is to ask to reserve our right to make objections until the closing is completed; and outside the presence of the Jury, make our objections at that time. Of course, if something gets out of hand, we will have to object at that point.
>
> BY MR. EVANS:
>
> That's very considerate of you. Thank you.
>
> BY THE COURT:
>
> Okay.

In the state's opening argument, the district attorney made the following statement (Vol. XII, p. 2058):

> ... Samuel Johnson wanted to be the judge and the jury that day. He wanted to return the verdict and then he wanted to return the sentence, but today is a different day. Today is the day I've waited for a long time because besides being an officer, Billy was a friend. Today is the day that Samuel Johnson is going to answer to twelve jurors for his crime. Today is the day and y'all are the twelve.

When defense counsel Harper had concluded his argument, he made the following objection to the opening argument of the district attorney (Vol. XII, p. 2068):

> BY MR. HARPER:
>
> Your Honor, at this time the Defendant would object to Mr. Evans' statements concerning his personal relationship with the Deceased, stating that he was a personal friend of his. There is nothing of that into evidence at all before this Jury, and we also move for a mistrial on that basis. It improperly prejudices the Jury.
>
> BY THE COURT:
>
> Let the record be noted and I will caution Mr. Evans in the future.
>
> BY MR. HARPER:
>
> And my motion for a mistrial, then, is overruled?
>
> BY THE COURT:
>
> Overruled. Let the Jury come in, please.

No objections to the district attorney's argument were made until he concluded. Among his remarks objected to were the following [his rebuttal concluded (Vol. XII, p. 2125)]:

> ... Like I said a minute ago, I pray to God that he gives you the wisdom to see through this and to see Samuel Johnson for the murderer he is because there ain't nothing else I can do but pray about it now. If he does give you that wisdom and if he gives you that strength of conviction and if he gives you that courage, you're going to find this man guilty of capital murder. Thank you.

The district attorney opened his rebuttal argument with the following comment (Vol. XII, p. 2112):

> I've been a lawyer since 1975, which ain't a long time to a lot of folks, I guess, but since then I've tried an average of one case a week, which makes a little better than three hundred cases. I'm going to tell y'all and everybody here and Mr. Diaz that I have never heard such blatant, arrogant disregard for the truth and patronizing tones that I've just heard from what you call a closing argument, and I'm not going to dignify the majority of it with an answer, ...

At the conclusion of the district attorney's argument, defense counsel made the following objections, followed by a motion for a mistrial, which was overruled (Vol. XII, p. 2127-2129):

> BY MR. DIAZ:
>
> Your Honor, we have three objections to Mr. Evans' closing argument, the first being that he made a personal comment, "Pray to God," based on personal belief. It violates, Your Honor, the Fourteenth Amendment and the Eighth Amendment.
>
> Your Honor, the second reason is personal attacks on myself. He called me a liar. It violates my Eighth Amendment, Fourteenth Amendment, and Mr. Johnson's Sixth Amendment.
>
> I also object to him making the comment that Mr. Johnson didn't want to go back to jail, and I would like to move for a mistrial.
>
> BY THE COURT:
>
> Let the motion for a mistrial be overruled and let the record show that this was at the conclusion of the case, and the attorneys agreed that they would not

make objections during the argument and it kind of binds the hands of the Court.

BY MR. ROBERTS:

I want to make a statement into the record too. I think that Mr. Evans' conduct was extremely commendable considering Mr. Diaz's comments from the Bible, which counteracts Mr. Evans', "Pray to God," and also Mr. Diaz' [sic] comments about cheap tricks imposed by the District Attorney. I want that in the record.

BY THE COURT:

Of course, the full record is—

BY MR. ROBERTS:

Yes, sir.

BY THE COURT:

—in the record.

BY MR. ROBERTS:

Yes, sir, I just want to make those comments too.

BY THE COURT:

Yes, sir.

BY MR. DIAZ:

Thank you, Your Honor.

Trial was held from August 30 through September 3, 1982.

On October 11, 1982, Johnson's trial counsel filed a nine-page motion for a new trial, assigning twenty-nine reasons why it should be sustained. The fifteenth assignment reads as follows (Vol. XIII, p. 2308):

15. The closing argument of the District Attorney in the guilt/innocence phase of Petitioner's trial, was inflammatory, included statements unsupported in the record, and contained a personal attack against Petitioner's trial counsel. The District Attorney accused defense counsel of fabricating evidence on Petitioner's behalf. The argument, in its entirety, was extremely prejudicial to Petitioner and violated his constitutional rights to due process and a fair trial as guaranteed by the laws and Constitution of the State of Mississippi and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

On October 12, 1982, the circuit judge entered an order relieving the trial counsel Gerald Diaz, Jr., and Gregory Harper, and appointing Kenneth J. Rose to represent Johnson on appeal and in future proceedings. This attorney filed a supplemental motion for a new trial on August 29, 1983, assigned seven additional grounds for a new trial, making no mention of the district attorney's argument. Thereafter, on August 31, 1983, counsel filed a second amended motion for a new trial assigning two additional grounds, one of which pertained to the district attorney's argument (Vol. XIV, pp. 2511–2512):

During the closing argument, the prosecutor connected the evidence of Otis Lee Fairley's prior trial and conviction to Samuel Johnson's case. "This case has been in my office since December the 31st, 1981. I've tried similar cases, two other similar cases, and it's a good thing they didn't ask me what I saw; because I see right now what you do, a murderer. Thats [sic] all.... I see a man fighting for his life against the likes of Charles Montgomery and Otis Fairley and Samuel Johnson, convicted murders ... I've tried two other cases just like this and I've seen what they've tried to do two times before this and I've seen what they've got away with and I see it here and it makes me mad and there ain't nothing I can do about it but pray to God that y'all see through it." (T. Trial at 1622, 1626, 1627). There was no evidence presented of prior murder convictions of Samuel Johnson or Charles Montgomery.

On his appeal, Johnson's counsel has found further statements objectionable.

[2, 3] We must first observe that the state and defense counsel should be given wide latitude in their arguments to a jury. This is inherent in, and indispensable to, our adversary system. Courts should be very careful in limiting the free play of ideas, imagery and the personalities of counsel in their argument to a jury.

[4–6] We next observe it is the duty of a trial counsel, if he deems opposing counsel overstepping the wide range of authorized argument, to promptly make objections and insist upon a ruling by the trial court. The trial judge first determines if the objection should be sustained or overruled. If the argument is improper, and the objection is sustained, it is the further duty of trial counsel to move for a mistrial. The circuit judge is in the best position to weigh the consequences of the objectionable argument, and unless serious and irreparable damage has been done, admonish the jury then and there to disregard the improper comment. See: *Wilson v. State*, 234 So.2d 303 (Miss.1970) at 308; *Aldridge v. State*, 180 Miss. 452, 177 So. 765 (1938) at 456; *Matthews v. State*, 148 Miss. 696, 114 So. 816 (1927) at 701.

[7] Defense counsel chose not to follow this familiar path, but to wait until the conclusion of the argument to object. This is quite illogical and extreme, and places the state in a "Catch 22" situation. To allow defense counsel to argue at conclusion of argument, to which no objection has been made, he is then entitled to a mistrial is not only inviting error, but also preventing the trial judge from taking the one step he could have taken to remove the possibility of prejudice. We cannot countenance assigned errors based on this sort of a proceeding.

There was not a single statement made by the district attorney, which, even if there were impropriety, could not have been immediately corrected by an objection being sustained, and an admonishment by the court.

Moreover, we have studied the entire argument of the prosecuting attorney. He perhaps made statements he should not have, strong. He was not complimentary of defense counsel. Neither was defense counsel complimentary of the district attorney. It is a common tactic, in one way or another, to diminish your adversary's case by reflections on his attorney. If it becomes too blatant, an objection should be sustained.

The complaint of the prosecution's argument include calling upon the Deity, making reference to the personal friendship of the district attorney and the victim, personal remarks directed to defense counsel, personal belief in Johnson's guilt, and frustration in prosecuting these cases. Every one of these complaints could have been quickly dissipated by a contemporaneous objection and ruling by the circuit judge.

Moreover, no appellate court would be warranted in reversing this case on the basis of the argument made by the district attorney.

III.

REFUSAL OF A CONTINUANCE

Johnson was indicted January 18, 1982. On March 1, 1982, the circuit judge entered an order specially setting the cause for trial July 13, 1982, in the Circuit Court of Covington County. On June 3, 1982, Johnson made a motion for a change of venue. On June 21, 1982, the circuit judge entered an order sustaining the motion, transferring the cause to Pike County, and setting the cause for trial August 30, 1982.

The record in this case reveals thorough and aggressive defense counsel. At least thirty pre-trial motions of one kind or another were made.

Inexplicably, defense counsel waited until August 30, 1982, to file a motion for a continuance on the ground two witnesses purported to be "forensic scientists" would be "out of the country" for the week beginning August 30. The motion further stated these witnesses had viewed all the evidence and prepared extensively from a "scientific point of view," and would be called as witnesses in the defendant's case in chief. Johnson filed no affidavit with the motion. Defense counsel Diaz attached an affidavit to postpone the trial thirty days in order to study the trial transcripts of trials of Montgomery and Fairley, which stated nothing, however, about the absent witnesses.

On August 18 there was a colloquy with the court about these witnesses, the circuit judge stated he had no knowledge as to

what they would testify, and got a general answer they were experts and would help defense counsel try the case.

[8] This motion contained almost none of the essential ingredients we have consistently required under Miss.Code Ann. § 99-15-29 (1972) to justify a continuance of a cause. It was also contemptuous of the obligation every trial counsel owes a court to wait until ten days before the pre-determined trial date to inform the circuit judge of the unavailability of these two witnesses, as shown by the facts in this particular case.

This assignment of error is frivolous.

IV.

LIMITATION OF CROSS EXAMINATION OF FIELDS

Prior to his death, Patrolman Langham had killed a black man. The state made a motion in limine to prevent Fields from testifying to this fact, which the circuit judge sustained. (Vol. V, p. 775)

The mere fact Langham had previously killed a black man in and of itself had no relevancy to this case. In order to make evidence of this fact competent in this case it was incumbent on the defense to in some manner demonstrate its relevancy.

No attempt was made to do so either before or during trial. It was not error, therefore, for the court to sustain the motion.

In Johnson's hearing on his motion for a new trial, conducted September 15, 1983, approximately one year following his trial, the circuit judge was presented with the following affidavit executed by Fairley on September 15, 1983 (Vol. XIV, p. 2520):

Before me the undersigned authority personally appeared Otis Lee Fairley who after being duly sworn deposes and says:

My name is Otis Lee Fairley. I grew up in Covington County. Anthony Fields is my first cousin, my father and his mother are brother and sister. Anthony Field's mother has lived for the last several years in Collins, Covington County Mississippi.

At Samuel Johnson's trial, I was not allowed to testify to a conversation between Anthony Fields and I in the Simpson County Jail in January, 1982, at which time he told me that the Highway Patrolman, Billy Langham, had murdered a black person in Jeff Davis County Ten (10) months before we were stopped. I asked Anthony Fields why he had to kill the Highway Patrolman instead of just coming to the car. He told me that he knew the Highway Patrolman had murdered a black person and that if he let him go he thought the Highway Patrolman would go for his gun and kill us before we could leave.

[9] On appeal Johnson argues he was prevented from introducing the *statement* allegedly made by Fields to Fairley as to why he, Fields, shot Langham. No such attempt to introduce such statement was ever made, by asking either Fields or Fairley if it was made. Had defense counsel done so, we would have an entirely different question on competency.

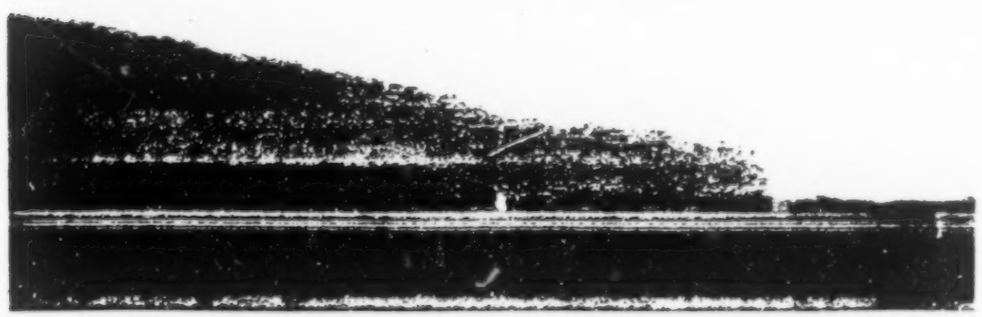
In looking at this record, we could not believe the state would have objected to the admissibility of this statement for either evidentiary or strategic reasons. The concluding sentence of this affidavit as a reason for killing Langham is nonsensical.

It is worth noting that during trial Fairley was given the opportunity on cross-examination to answer why Fields would have shot Langham, but only stated: "He knew all the officers from Covington County." (Vol. XI, p. 1908) There is no merit to this contention.

V.

INSTRUCTION ON CAPITAL MURDER

[10] Johnson argues the court's instruction failed to embrace the statutory requirements of murder and capital murder, and also to require the state to prove intent on his part to commit murder. See: Miss. Code Ann. § 97-3-19(1)(a), and (2)(a).



Instruction C-7 reads in pertinent part (Vol. XII, pp. 1989-1990):

The defendant, Samuel Johnson, has been charged by an indictment with the crime of capital murder for having wilfully, unlawfully, feloniously, of his malice aforethought and without authority of law kill and murder Billy Morris Langham, a human being, and that the said Billy Morris Langham was a peace officer at the time of the alleged murder, and that at the time of the alleged murder Pilly Morris Langham was acting in his official capacity as a peace officer, and that at the time of the alleged murder the defendant, Samuel Johnson, knew that Billy Morris Langham was a peace officer acting in his official capacity.

If you find from the evidence in this case beyond a reasonabely [sic] doubt that:

1) The defendant, Samuel Johnson, aided and commanded Charles Montgomery to commit capital murder by stabbing Officer Billy Morris Langham with a knife and ordering Charles Montgomery to shoot Officer Billy Morris Langham; and

2) That Charles Montgomery wilfully, unlawfully, feloniously and of his malice aforethought and without authority of law kill and murder Billy Morris Langham a human being, by shooting said Billy Morris Langham with a .357 Magnum pistol; and

3) That Billy Morris Langham was a peace officer, to-wit: a member of the personnel of the Mississippi Highway Patrol; and

4) That Billy Morris Langham was acting in his official capacity as a peace officer at the time of his death; and

5) That the defendant, Samuel Johnson, then and there had knowledge and knew that the aforesaid Billy Morris Langham was acting in his official capacity as a peace officer aforesaid; and

6) That said killing and murder of Billy Morris Langham occurred on the 31st day of December, 1981 in Covington County, Mississippi

then you should find the defendant, Samuel Johnson, guilty of capital murder, and the form of your verdict may be:

"We, the jury, find the defendant, Samuel Johnson, guilty of capital murder."

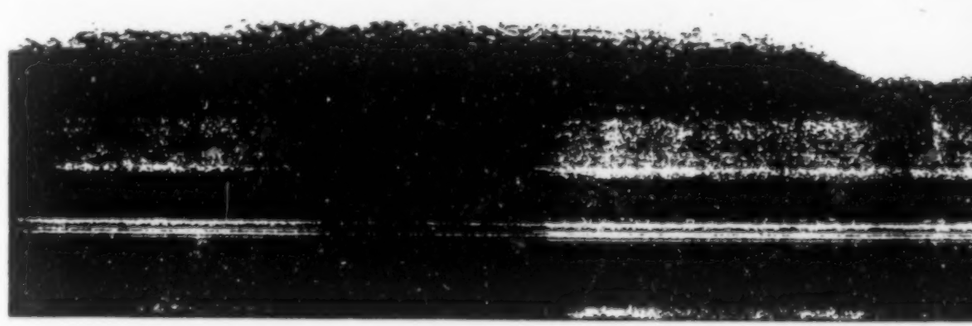
If you find the State has failed to prove any one of the essential elements of the crime of capital murder, you must find the defendant not guilty of capital murder and you will proceed with your deliberations to decide whether the State has proved beyond a reasonable doubt all the elements of the lesser crime of murder less than capital.

It can be readily observed that the first part of C-7 requires intent on the part of Johnson to kill Langham, and knowledge that he was killing a peace officer acting in his official capacity. The following paragraph with its six sub-parts clearly define the acts necessary to come within the capital murder framework. The jury could not have been misled by this instruction. It was never the contention of Johnson, either in the circuit court or on appeal, that the slaying of Langham was not a capital murder. His defense was he had nothing to do with the slaying. We do not have the situation of two parties engaged in a felony, and one without the actual knowledge or consent of the other committing a murder, also. The authorities cited by Johnson are inappropriate.

Moreover, defense counsel approved these instructions by the circuit court. *Williams v. State*, 445 So.2d 798 (Miss. 1984) at 807; *Rayburn v. State*, 312 So.2d 454 (Miss.1975) at 455; Rule 42 Miss. Sup.Ct. Rules.[1]

1. The state's only answer to this assignment of error in its brief was that it was waived. We have also addressed the assignment on its merits.

While the state is correct the point was waived, we think a word of caution is in order. When the state fails to answer an assignment of error on the merits, and rests its case with the contention the point has been waived, it places



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VI.

EVIDENCE OF PLEA AND SENTENCE OF STATE'S WITNESS

During the state's questioning of Fields, it was brought out that he pleaded guilty and had been sentenced to twenty-five years for his part in this crime. In closing argument the district attorney argued that it was necessary to do this to bring the parties responsible for the officer's death to justice.

The language of this Court in *Buckley v. State*, 223 So.2d 524 (Miss.1969), under unusual facts has been the basis for numerous assignments of error. It is time we distinguish *Buckley* from the usual case.

Let us take the ordinary case in which two or more people are charged with the commission of a crime, and it is necessary that one of the participants in the crime testify for the state in order to make out a case against any of them. Frequently, the state will choose the person whose participation is not as great, or whose guilt is not as reprehensible, or who has readily confessed. Generally speaking, there are good, and at times compelling reasons for the state's choice among those accused to be the witness for the state.

It is not the function of the court, however, to tell the state which witness among the accused persons to select as the witness for the state. It is the right of the state to select which witnesses it deems proper to testify on its behalf.

[11] While it is the sole responsibility of the circuit judge to sentence each accused who has been convicted or pleaded guilty, it is not improper for a circuit judge to take into consideration in his sentencing that such person is cooperating with, and will be a witness for the state in the prosecution of other defendants.

A co-conspirator, co-defendant or co-indictee who has been thus favored, however, is a marked man before the jury. There is a big question mark placed upon his testimony by the law, and indeed the accused on trial is entitled to an instruction that his testimony is to be viewed with caution.

One of the best weapons for defense counsel to further arouse the distrust of the jury in the testimony of such witness is to ask him on cross-examination whether he has been sentenced or not for his participation, and if so, the sentence he has received. Invariably, if he has been sentenced, it will be much lighter than the sentence the man on trial can receive and, if he has not been sentenced, defense counsel can exploit even more the weakness and untrustworthiness of the testimony from such a witness.

These observations are to point out that in the ordinary case, if the state did not on direct have such witness testify as to his plea of guilty and sentence, defense counsel on cross-examination most assuredly would. Indeed, defense counsel would be derelict in his duty to his client not to point this out to the jury, so as to show a very special interest the witness has in his own testimony.

In closing argument, defense counsel has no better weapon to demonstrate the weaknesses of such testimony, the disparity of the sentence received by the state's witness, and the sentence which the court can inflict upon his client. Indeed, even though the state brings out on direct examination the plea of guilty, defense counsel invariably will further exacerbate the state's problem on cross-examination of such witness and hammer away at the disparity in treatment in final argument.

What harm has resulted, then, by the state making this concession in its examination in chief?

In the ordinary case, none.

Buckley presented a special set of facts. Buckley and one Billy Roy Pitts were indicted for kidnapping. At Buckley's first trial, Pitts testified as a witness for Buckley, corroborating Buckley's testimony.

itself in some jeopardy. We do not know whether in so doing the state is conceding that

if the point in fact was not waived, it is meritorious.

This trial ended in a mistrial when the jury failed to reach a verdict. Prior to the second trial, Pitts pleaded guilty to the charge, and at Buckley's second trial testified as a witness for the state. His testimony in the second trial corroborated the testimony of the kidnap victim, and contradicted Buckley's.

Over the objection of Buckley, the state was permitted to prove Pitts had pleaded guilty and then sentenced to serve five years. We found this to be reversible error there because proof of the plea of guilty *over Buckley's objection* had the effect of bolstering the testimony of an admitted perjurer. We stated:

> Appellant assigns as error the action of the trial court in overruling his objection to that part of the testimony of Pitts wherein he testified that he had been jointly indicted on the charge of Kidnapping Jack Watkins and that he had plead guilty to that charge, and as a result of his plea of guilty, had been sentenced to serve a term of five years in the state penitentiary. The overruling of this objection and admission of this testimony was reversible error. The law is well settled in this state that where two or more persons are jointly indicted for the same offense but are separately tried, a judgment of conviction against one of them is not competent evidence on the trial of the other because such plea of guilty or conviction is no evidence of the guilt of the party being tried. *State v. Thornhill*, 251 Miss. 718, 171 So.2d 308 (1965); *Pieper v. State*, 242 Miss. 49, 134 So.2d 157 (1961); *Pickens v. State*, 129 Miss. 191, 91 So. 906 (1922). Not only was this testimony designed to lead the jury to believe that since Pitts had plead guilty to the charge, that his co-indictee, Buckley, was also guilty, but it was also designed to bolster the testimony of Pitts. On the first trial of this case Pitts testified and his testimony in that trial corroborated Buckley's version of what happened. On this trial he testified directly contrary on the crucial issues. The state was aware that the evidence that Pitts had plead guilty to the same charge since the former trial would add weight to his testimony. It had the effect of bolstering the testimony of an admitted perjurer. [223 So.2d at 527–528]

The *Buckley* rationale is not present in this case. Indeed, defense counsel made no objection to the state's elicitation in its direct examination of Fields that he had pleaded guilty and been sentenced for his part in the crime. Defense counsel had excellent reason not to object, this was a fact very much in Johnson's interest with which to acquaint the jury.[2]

[12, 13] We do not overrule *Buckley*, but neither do we extend its holding beyond the unusual situation of that case. If defense counsel under some unusual case wishes to withhold from the jury the fact that a co-indictee testifying for the state has pleaded guilty and received a lesser sentence, he has a duty to object to the testimony offered by the state. This duty is more compelling in a case of this sort than in the usual case in which we have held that failure to object to testimony waives any assignment of error on appeal.

To permit this defendant to say nothing at trial, and complain for the first time in post-trial proceedings presents a classic case of having your cake and eating it, too.

VII.

REFUSAL OF INSTRUCTION

Johnson complains of the circuit judge's refusal of requested Instruction D–15 (Vol. XII, pp. 2025–2026). This instruction would have authorized the jury to separately consider whether he was guilty or not of the crime of being an accessory after the fact.

2. It is interesting that in this case one of the pre-trial motions was to require the state to disclose any agreement it had made with any prosecuting witness that would influence his testimony, because such agreement would affect the credibility of the witness, and the "trial jury is entitled to know it." [Vol. II, p. 262]

[14] No authority is cited in support of this contention, and it is without merit. Johnson was on trial for capital murder, and he was entitled to instructions fully embodying all the elements of this crime, and further that in the absence of proof such elements, he was entitled to an acquittal. He was not entitled, however, to have the jury separately instructed and separately to consider whether or not he was guilty of being an accessory after the fact. See: *Wilcher v. State*, 455 So.2d 727 (Miss. 1984).

SENTENCING PHASE

VIII.

DENIAL OF FUNDS FOR OUT-OF-STATE WITNESSES

The record reveals that on motion by defense counsel, the court awarded expenses to counsel to travel to New York and interview prospective witnesses.

On August 28, 1982, defense counsel filed a motion for compulsory process and attendance fees, as well as travel expenses, for twenty-one prospective witnesses. Attached to the motion is an appendix summarizing the content of their knowledge of Johnson. From the summary of their proposed testimony, it is clear they were character witnesses.

[15, 16] While under the holding of the United States Supreme Court in *Eddings v. Oklahoma*, 455 U.S. 104, 113–115, 102 S.Ct. 869, 876–877, 71 L.Ed.2d 1 (1982), it might have been proper in the sentencing phase of the trial to have such witnesses testify on Johnson's background, that case is not authority for the proposition that a state is required to furnish travel expenses for out-of-state prospective character witnesses. Moreover, the State of Mississippi is without authority to compel the attendance of out-of-state defense witnesses in a criminal case. See: *Diddlemeyer v. State*, 234 So.2d 292, 295 (Miss.1970). Under Article 3, Section 26 of our Constitution an accused is entitled to compulsory process for witnesses in his favor. The state's only power, however, is to reach witnesses within the state.

[17] In any event, before a circuit judge should be criticized, defense counsel at a minimum, was under a duty to furnish detailed statements in affidavit form from each of these proposed witnesses as to what their testimony would be in the trial of the case. In this case the only thing presented to the circuit judge was a summary by counsel, not sworn to, as to what these witnesses might testify.

IX.

IMPROPER ARGUMENT IN SENTENCING PHASE

In complaining of improper argument of the district attorney during the sentencing phase, Johnson contends the state led the jury to believe if he were sentenced to life, he would eventually be paroled. Pertinent parts of the argument for the state and defense are as follows:

CLOSING ARGUMENT

ON BEHALF OF THE STATE

BY MR. EVANS:

Now, what you're considering is serious business. It's about as serious as it gets in our law and in our lives. And a lot of good-hearted and well-meaning people who don't understand the purpose and the necessity of capital punishment will probably say that I'm very cold and harsh and cruel when I stand here and I say that because of having been convicted of second degree assault with intent to commit first degree rape and capital murder that Samuel Johnson should die.... [Vol. XIII, p. 2276]

* * * * * *

This makes the tenth time that I have either tried or prepared for trial a capital murder case, and if Mr. Johnson's lawyers argue like all those others I've been involved in, they'll ask you for mercy, they'll ask you for compassion, and they'll ask you for compassion, if they're like the others and tell you that Samuel Johnson doesn't want to die. Billy didn't want to die either. And if they argue like the others, they'll ask you for mercy and plead for Samuel Johnson's life. Billy plead for his life. But mercy wasn't in the heart of Samuel Johnson last New Year's Eve when he told Charles Montgomery twice to shoot.... [Vol. XIII, p. 2277]

CLOSING ARGUMENT

ON BEHALF OF THE DEFENDANT

BY MR. HARPER:

. . The only thing I'm here to do right now is to ask you to spare his life. And Mr. Evans is right, I am getting up here asking for mercy. I am asking you to spare his life.

I want you to remember what Dr. Fisher said. And on this Instruction, PS–2, that Mr. Evans has referred to, there are several things that you are to consider as mitigating circumstances. I want you to study this instruction when you get back there and I want you to remember what Dr. Fisher said, that he can function in prison with that life sentence and not be violent. [Vol. XIII, pp. 2279–2280]

* * * * * *

I ask you to study the instruction here and remember those things, and I ask you to think about what it's going to be like if he goes to the gas chamber, what it will be like there, and I ask you to spare his life. [Vol. XIII, p. 2281]

FINAL CLOSING ARGUMENT

ON BEHALF OF THE STATE

BY MR. EVANS:

I can tell you what it's like. It's a gray room all the way around about like this and there's a bench in it and under that bench, there is a pail of water and above that are two pills, and the Sheriff pulls the handle that drops those pills into water. Then Sam Johnson will take a deep breath and in five to ten seconds his life will be ended. There will be no pain, there will be no agony, there will be no suffering. He won't feel a knife in his back and he won't feel a bullet exploding in his brain. And that's what it's like.

Dr. Fisher said that Samuel Johnson can adapt to prison life. My first response was that we're not here to see how Sam Johnson will adapt to prison life. What concerns me is what is going to happen the next time he decides to commit a second degree assault with intent to rape and what is going to happen the next time he decides he wants a Highway Patrolman or another law enforcement officer dead. You heard Dr. Fisher's testimony that inside prison his potential for violence was low, but outside, it was high. I just can't get concerned about how he would adapt to prison life when I know that his potential for dangerousness on the outside is high. [Vol. XIII, p. 2282]

* * * * * *

... [W]e have a system that really does work after all. And, as I told you before, I will now, in the name of that system and the decent, law-abiding people in Mississippi, and by the authority that the ones in the Thirteenth District gave me, I'm going to ask that you retire and come back in a little while and tell Judge Pittman by your verdict, yes, we find that the aggravating circumstances do outweigh the mitigating circumstances we find that a man who commits second degree assault with intent to commit first degree rape and a man who has been returned to the penitentiary again and again and again, spent 10 of the last 18 years in the penitentiary, and a man who has a high potential for hurting other people and a man who has taken an innocent life when he killed an officer while that officer was enforcing the laws of our good people, has chosen himself to forfeit his life in the eyes of God and in the eyes of our law. You are not the one executing Samuel Johnson. Regardless of what they tell you, you're not the one

He chose that himself when he decided to be a criminal in 1963. So, as I said, I now ask you to retire and return shortly and tell Judge Pittman that the aggravating circumstances outweigh the mitigating circumstances and because of that, Samuel Johnson should suffer the penalty of death. [Vol. XIII, p. 2287]

In *Hill v. State*, 432 So.2d 427, p. 439 (Miss.1983); and in *Wiley v. State*, 449 So.2d 756, p. 761 (Miss.1984), we condemned an argument which intimated to the jury that their decision "was not the last word."

In *Wiley*, we likewise disapproved an argument by the prosecution which stresses that any sentence to life imprisonment inevitably means parole for the convicted person, rather than having to serve his entire life in prison.

[18] It is clear from the argument from the prosecution in this case that the district attorney never reached the type of argument which we condemned in *Hill*, supra, or in *Wiley*, supra. The argument made was in answer to the argument of defense counsel, and was fair argument.

In addition to this, defense counsel made no objection whatever to the argument by the state. As we have stated many times, and again in *Hill*, we are not obligated to review any assignment of error for closing argument in which there was no objection made during the trial.

We have carefully reviewed the entire argument by the state and defense counsel, and we find no reversible error for any statement made by the prosecution.

X.

SENTENCE NOT DISPROPORTIONATE

[19] It is the duty of this Court under Miss.Code Ann. § 99-19-105(3)(c) to review the proportionality of every death sentence. We also have this responsibility under decisions of the United States Supreme Court, as well as our own. See: *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Billiot v. State*, 454 So.2d 445 (Miss.1984); *Dufour v. State*, 453 So.2d 337 (Miss.1984); and *Neal v. State*, 451 So.2d 743 (Miss.1984).

[20] Under the facts of this case, the jury was warranted in believing Johnson an active participant, if indeed not the leader, in a deliberate, brutal slaying of a peace officer carrying out his duties. In the absence of the abolition of the death penalty, no appellate court is justified in holding that the jury, having found Johnson guilty, could not also return a death penalty verdict under these facts.

[21] The very word "murder" embraces within its meaning cruelty, brutality and an evil intent carried to the ultimate in harm: death. It is redundant to characterize a murder as cruel, brutal or malicious.

Civilized society must place its dependence on peace officers. They preserve the peace, protect us from harm, and pursue the wrongdoer. They are the front line infantry in society's eternal struggle with crime.

[22] The murder of a police officer in the line of duty must be equated with treason or espionage in time of war. Such a crime warrants the most severe punishment society exacts.[3]

We are not persuaded by Johnson's first argument that his case comes under the proscription of *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). That case involved a defendant who was a participant in a robbery, but who had nothing whatever to do with the slaying of the robbery victims.

Nor, is there any merit to Johnson's second argument that because Fairley and Montgomery in separate capital murder trials received verdicts of life imprisonment from the juries, Johnson could only be sentenced to life. See: *Bullock v. State*, 391 So.2d 601, pp. 612-614 (Miss.1980);

3. It follows this case is not disproportionate to the sentences imposed in other capital murder cases. See "Appendix A" for cases considered by this Court in this case.

XI.

PRECLUSION OF EVIDENCE OF SENTENCES OF CO-DEFENDANTS

[23] Somewhat more troublesome is Johnson's argument that the circuit judge erred in excluding from consideration by the jury during the sentencing phase that the juries trying Fairley and Montgomery had rendered life sentence verdicts. Clearly, under *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), Johnson was entitled to have his trial jury consider "any relevant mitigating circumstance."

[24] Were the life sentences of Fairley and Montgomery *relevant mitigating circumstances?*

We must hold they were not. Suppose, for example, the juries which tried Fairley and Montgomery had returned death penalty verdicts? Would the state, under any theory, have been permitted to show this over Johnson's objection? Each case tried by a separate jury must stand on its own. Otherwise, the jury trial is pointless.

Moreover, for the separate sentences of Fairley and Montgomery to have had any meaning in Johnson's, it would have been necessary to develop all the facts of each of their trials for this jury.

Johnson cites two Florida cases, both of which are distinguishable. In *Messer v. State*, 330 So.2d 137 (Fla.1976), the Florida Supreme Court held the trial court erred in excluding from consideration by the jury during sentencing phase the plea bargained second degree murder sentence received by a co-defendant. As we stated, supra, Johnson in this case was clearly entitled to have the jury know and consider the guilty plea and sentence of Fields. This is quite different from the convictions of Fairley and Montgomery.

Slater v. State, 316 So.2d 539 (Fla.1975), involved a circuit judge overruling a jury recommendation of life imprisonment and imposing the death sentence, a procedure authorized under the Florida statutes. The Florida Supreme Court in turn overruled the circuit judge's imposition of the death sentence, the main reason being that an equally culpable defendant had been authorized to plead *nolo contendere* to first degree murder and received a life sentence.

Thus, it is clear the Florida cases have no application to this case.

XII.

SENTENCING INSTRUCTION PS-2

Johnson's first complaint on this instruction is that it did not provide a "principled basis for distinguishing this case from the many other murder cases in which the death penalty was not imposed under the statute." His supporting argument is somewhat amorphous, nebulous, which we would be inclined to ignore in a less somber case. As we construe it, he argues that including as an aggravating circumstance his 1963 conviction of assault to commit rape did not channel the sentencing jury's discretion by "clear and objective standards."

[25] We note that Miss.Code Ann. § 99-19-101(5)(b) authorizes the sentencing jury to consider as an aggravating circumstance, "the defendant was previously convicted ... of a felony involving the use or threat of violence to the person." Contrary to Johnson's assertion, this is a clear and objective standard, fulfilling the guidelines of the United States Supreme Court in *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), and as further stated by *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983); and *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

[26] It is not the purpose of Federal appellate review to deny to the states the authority to and responsibility for determining the aggravating circumstances which justify a death penalty. *Gregg v.*

Georgia, supra; *Zant v. Stephens*, supra; *California v. Ramos*, supra; and *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976).

[27] Nor is it the function of this Court to curtail this authority vested in our legislature. We cannot say the legislature had no constitutional authority to include this as an aggravating circumstance in a death penalty case.

[28] Johnson further claims, without citing authority, that the conviction was too remote in time to be considered as an aggravating circumstance. Again, we are not prepared to deny the legislature had the power and lawful authority to include this aggravating circumstance in the instruction on the facts in this case. We note the circuit judge wisely and humanely permitted Johnson to include in the instruction as a *mitigating circumstance* the remoteness in time of this conviction. Johnson was thus permitted to argue to the jury the point he asserts here, and in this argument he had the approval of the court's own instruction. Cf. *Zant v. Stephens*, supra; *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

Nor do we find merit in Johnson's next contention that the record does not support a consideration by the jury as an aggravating circumstance that Johnson committed the murder for the purpose of avoiding arrest.

Finally, he argues the record does not support a jury consideration whether the murder was especially heinous, atrocious and cruel. But, see: *Booker v. State*, 449 So.2d 209 at 220–221 (Miss.1984); *Caldwell v. State*, 443 So.2d 806 (Miss.1983) at 814–815; and *Irving v. State*, 441 So.2d 846 (Miss.1983) at 849–850.

JOHNSON'S SUPPLEMENTAL BRIEF

Johnson filed a supplemental brief containing seven additional assignments of error.

XIII.

WAS THERE A DISCOVERY VIOLATION?

Simpson County Jail inmate Norman Shelly was called by the state as a rebuttal witness at the guilt phase of appellant's trial. [Vol. XI, pp. 1928–1930] Shelly testified he overheard a conversation between Johnson and cellmate and co-indictee Otis Lee Fairley in which, without objection by defense counsel, the following transpired at trial:

Q. Tell me what you heard Mr. Johnson and Mr. Fairley say. Without telling anybody else.

A. I overheard them talking about how one took the knife off the top of the car.

Q. Which one was that?

A. And gave it to the other one. Otis took the knife off the top of the car and gave it to Sam.

Q. What did Sam say, if anything, if you remember?

A. I don't know. I can't remember where—he just stated that was the fact, the way he took the knife and *used the knife*.

Q. Is that the gist of the conversation as best you can remember it?

A. Yes, sir.

[Vol. XI, p. 1930] [Emphasis added]

There was no objection and the defense cross-examined Norman Shelly. In this appeal the appellant pleads complete surprise and that he had no opportunity to interview the witness concerning this statement.

Defense made two motions before trial which in this assignment of error he asserts have been violated. The first was a motion for disclosure of witnesses, all evidence favorable to accused and discovery and inspection [Supplemental Abstract, pp. 389–390; Vol. II, pp. 207–210], which was granted. [Supplemental Abstract, p. 391; Vol. V, p. 706] The second was a motion to supress written or oral statements made to Johnson by any investigating officer [Supplemental Abstract, pp. 392–393; Vol. II, pp. 224–226], which was granted as conceded by the D.A. *Tolbert v. State*, 441 So.2d 1374, 1375 (Miss.1983).

[29] Johnson claims in this assignment the admission of the above conversation into evidence was reversible error because the prosecutor deliberately violated a court suppression order. He complains the suppression order directed that "no statement of the defendant regarding the facts can be used against him at the trial of this cause."

Contrary to what Johnson now asserts, the above conversation was not embraced in any discovery motion or discovery order.

Johnson's brief contains the following astonishing statements: "Shelly's testimony came as a complete surprise to the Appellant. Defense Counsel had no opportunity to interview the witness concerning the statements attributed to the Appellant." [sic] [Supplemental Brief, p. 1]

If this were the case, why did defense counsel make no objection? Further, the admission of this testimony was not assigned as error in the detailed motions for new trial. On appeal, Johnson has changed counsel. Johnson and his counsel go outside the record in claiming Shelly's testimony came as a complete surprise. No such claim appears in the record.

To permit a defendant and his counsel in any case, including a death penalty case, to sit idly by and make no objection to questionable testimony, exacerbate the matter still further by ignoring the testimony in the motion for new trial, and argue for the first time on appeal the admission of such testimony, would countenance the laying of a trap in every case. This is especially true where, as in this case, there has been a change in defense counsel.

In the first place, from this record we do not know if Johnson's counsel was unaware of this proferred testimony prior to trial. In the second place, it is clear from this record Johnson was ably represented by thorough defense counsel, and there may have been a very good reason why no objection was made.

The facts of this case are clearly distinguishable from *Tolbert v. State*, 441 So.2d 1374 (Miss.1983), and there is no merit in this assignment.

XIV.

VIOLATION OF RULE IN PERMITTING THE SHERIFF TO TESTIFY

[30] In rebuttal Sheriff Lloyd Jones testified. Johnson complains that Sheriff Jones should not have been permitted to testify in rebuttal to deny he had a conversation with a defense witness Carl Lee. The reason is that Jones was not excluded from the courtroom when the rule was invoked. Permitting an officer of the court to remain in the courtroom is discretionary with the trial court. See: *Bell v. State*, 443 So.2d 16 (Miss.1984).

XV.

WAS DEFENDANT BROUGHT IN THE PRESENCE OF THE JURY IN HANDCUFFS?

[31] Johnson goes outside the record and claims that he was brought into the courtroom in the presence of the jury in handcuffs. The record does not support this claim. Indeed, the record indicates that the court saw to it that this would not occur. [Vol. VIII, p. 1250]

XVI.

ADMISSION OF CHECKS FOUND IN AUTOMOBILE, WHICH CONTAINED FINGERPRINTS OF JOHNSON AND LANGHAM

[32] The trial court permitted the introduction into evidence of checks found in the automobile, after ruling that they could only be referred to as "documents." [Vol. IX, pp. 1506–1511] These documents were not circulated to the jury but the fingerprint expert referred to them in his identification as having the fingerprints of Johnson.

XVII.

FAILURE TO PROVIDE JOHNSON WITH COUNSEL AT THE ARRAIGNMENT HEARING

[33] Johnson complains, without citation of authority, the state failed to provide him with counsel at the "initial appearance hearing." He states this violated his constitutional rights. The record does not support this contention. [Vol. IV, p. 605, et seq.]

XVIII.

EXCLUSION OF JURORS WHO HAD CONSCIENTIOUS SCRUPLES AGAINST INFLICTION OF DEATH PENALTY

[34] Johnson argues that it was error to exclude in the guilt phase of his trial jurors who clearly had fixed conscientious scruples against infliction of the death penalty. There was no error in excluding such jurors. See: *Wilcher v. State*, 448 So.2d 927 (Miss.1984); *Sonnier v. Maggio*, 720 F.2d 401 (5th Cir.1983); *Smith v. Balkcom*, 660 F.2d 573 (5th Cir.1981); *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir.1978); and *Woodard v. Hutchins*, 464 U.S. 377, 104 S.Ct. 752, 78 L.Ed.2d 541 (1984).

XIX.

THE ADMINISTRATION OF THE DEATH PENALTY IN THIS STATE IS ARBITRARY AND DISCRIMINATORY IN VIOLATION OF THE APPELLANT'S EIGHTH AND FOURTH AMENDMENT RIGHTS

Johnson claims that he was denied a request to present evidence on the death penalty being administered in an arbitrary and discriminatory manner. The record reveals Johnson made a motion to strike and quash as unconstitutional the death penalty statute (Vol. II, pp. 239-243) and the hearing his counsel requested on the motion was held by the court. (Vol. IV, pp. 605-709).

[35] Nothing offered by Johnson supports his contention that the death penalty is being administered unfairly because of either his or the victim's race.

PART B.

ROY NOBLE LEE, Presiding Justice, for the Court:

THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON THEIR OPTION TO RECOMMEND A LIFE SENTENCE EVEN IF AGGRAVATING CIRCUMSTANCES WERE FOUND TO OUTWEIGH MITIGATION.

The requested instruction, which was refused by the court, follows:

> The court instructs the jury that if you see fit, whether mitigating circumstances exist or not, you may recommend [sic] mercy for the defendant. This recommendation is solely in your discretion and not controlled by any rule of law. You may make such recommendation with or without a reason.

[36] The appellant contends that refusal of the instruction constituted reversible error. However, the question has been resolved against the position of appellant in three (3) felony murder cases wherein the death penalty was imposed, viz. *Bullock v. State*, 391 So.2d 601 (Miss.1981); *Jordan v. State*, 365 So.2d 1198 (Miss.1978); and *Hill v. State*, 432 So.2d 427 (Miss.1983). In *Hill v. State*, a similar instruction to that refused here was under consideration. The Court said:

> Argument of appellant is that reversible error was made by the trial court when it failed to grant the following sentencing information requested by the defense:
>
> Instruction D-2:
>
> Ladies and gentlemen of the jury, I charge you that you need not find any mitigating circumstance in order to return a sentence of life imprisonment. A life sentence may be returned regardless of the evidence.
>
> The appellant contends that this refusal had the effect of denying the jury the right to sentence him according to their feelings of mercy. He maintains that the jury was left with the impression

> that they were bound to return a verdict that the appellant should suffer the death penalty if they found that aggravating circumstances outweighed the mitigating circumstances from the evidence presented. According to him, this would be tantamount to a mandatory application of the death penalty and contrary to the mandate of individualized consideration handed down by the United States Supreme Court in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).
>
> We do not agree that the jury in the case in question was under any impression that they had no choice but to impose the death penalty. Their verdict was as follows:
>
> > We, the Jury, unanimously find that the aggravating circumstances . . . outweigh the mitigating circumstances and are sufficient to impose the death penalty, and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances . . . .
>
> 432 So.2d at 441.
>
> The jury verdict in the case sub judice was almost verbatim to the verdict in *Jordan* and the same reasoning that applied there must prevail here.
>
> Juries may pardon an accused by a not guilty verdict, when his guilt is overwhelming from the record; they may exercise clemency toward one found guilty, where the statute permits juries to fix the punishment, and the verdicts will be upheld. However, trial judges are required to instruct juries, according to the law.
>
> The judgment of the lower court is affirmed and Wednesday, the 19th day of June, 1985, is set as the date for execution of the sentence and infliction of the death penalty in the manner provided by law.

AFFIRMED AS TO GUILT PHASE. AFFIRMED AS TO SENTENCING PHASE.

PATTERSON, C.J., WALKER, NOBLE LEE, P.JJ., and DAN M. PRATHER, ROBERTSON, SULLIVAN and ANDERSON, JJ., concur as to Part A.

HAWKINS, J., dissents as to Part B.

APPENDIX "A"

DEATH PENALTY CASES AFFIRMED BY THIS COURT:

Cabello v. State, 471 So.2d 332 (Miss.1985)
Billiot v. State, 454 So.2d 445 (Miss.1984)
Dufour v. State, 453 So.2d 337 (Miss.1984)
Stringer v. State, 454 So.2d 468 (Miss.1984)
Wilcher v. State, 455 So.2d 727 (Miss.1984)
Wilcher v. State, 448 So.2d 927 (Miss.1984)
Neal v. State, 451 So.2d 743 (Miss.1984)
Booker v. State, 449 So.2d 209 (Miss.1984)
Caldwell v. State, 443 So.2d 806 (Miss.1983)
Irving v. State, 441 So.2d 846 (Miss.1983)
Tokman v. State, 435 So.2d 664 (Miss.1983)
Leatherwood v. State, 435 So.2d 645 (Miss.1983)
Hill v. State, 432 So.2d 427 (Miss.1983)
Pruett v. State, 431 So.2d 1101 (Miss.1983)
Gilliard v. State, 428 So.2d 576 (Miss.1983)
Evans v. State, 422 So.2d 737 (Miss.1982)
King v. State, 421 So.2d 1009 (Miss.1982)
Wheat v. State, 420 So.2d 229 (Miss.1982)
Smith v. State, 419 So.2d 563 (Miss.1982)
Edwards v. State, 413 So.2d 1007 (Miss.1982)
Johnson v. State, 416 So.2d 383 (Miss.1982)
Bullock v. State, 391 So.2d 601 (Miss.1980)
Reddix v. State, 381 So.2d 999 (Miss.1980)
Jones v. State, 381 So.2d 983 (Miss.1980)
Culberson v. State, 379 So.2d 499 (Miss.1979)
Gray v. State, 375 So.2d 994 (Miss.1979)

APPENDIX A—Continued

Jordan v. State, 365 So.2d 1198 (Miss. 1978)
Voyles v. State, 362 So.2d 1236 (Miss. 1978)
Irving v. State, 361 So.2d 1360 (Miss. 1978)
Washington v. State, 361 So.2d 61 (Miss. 1978)
Bell v. State, 360 So.2d 1206 (Miss.1978)

DEATH PENALTY CASES REVERSED AS TO PUNISHMENT AND REMANDED FOR RESENTENCING TO LIFE IMPRISONMENT:

Edwards v. State, 441 So.2d 84 (Miss. 1983)
Dycus v. State, 440 So.2d 246 (Miss.1983)
Coleman v. State, 378 So.2d 640 (Miss. 1979)

DEATH PENALTY CASES REVERSED AS TO PUNISHMENT AND REMANDED FOR A NEW TRIAL ON SENTENCING PHASE ONLY:

Mhoon v. State, 464 So.2d 77 (Miss.1985)
Cannaday v. State, 455 So.2d 713 (Miss. 1984)
Wiley v. State, 449 So.2d 756 (Miss.1984)
Williams v. State, 445 So.2d 798 (Miss. 1984)

HAWKINS, Justice, dissenting as to Part B:

For the reasons stated in dissenting in *Hill v. State*, 432 So.2d 427, 453 (Miss. 1983), and also adopting the views of Justice Robertson in his dissent in *Leatherwood v. State*, 435 So.2d 645, 660 (Miss. 1983), I think the circuit judge erred in refusing to grant the instructions informing the jury it had the discretion to impose a life sentence upon Johnson, regardless of the evidence.

To me the jury system is sacred, a view apparently shared by the authors of our State Constitution, who wrote, "The right of trial by jury shall remain inviolate. . . ."[1] It is not rhetoric or oratory, at least to me, to assert there is more wisdom in juries than can ever be enunciated by judges.

We learned 100 years ago in this state, after at least 150 years' experience, that the jury should have the absolute right, and should be instructed by the Court that they and they alone had such right, to spare the defendant's life regardless of the evidence. See: *Spain v. State*, 59 Miss. 19 (1881).

We recognize that opinions from the U.S. Supreme Court, beginning in 1972, have drastically changed capital offense laws and procedures, but no U.S. Supreme Court decision has ever suggested this discretionary power be removed from the jury to *spare the defendant's life*. Rather, the channeling of the jury's discretion was to limit the circumstances under which it could impose the death penalty, not the reverse.

Yet, this Court has held the jury is not entitled to be instructed by the circuit judge that it has this sacred right.

In doing so we ignore history and human experience; we implicitly overrule *Spain v. State*. We denigrate the majesty of our jury system. I can only urge this Court some day to change the present majority holding. I hope circuit judges of this State will unanimously, as many already do, tell the jury as we said 100 years ago, they have the discretion, regardless of the evidence, to sentence the defendant to life imprisonment rather than death.

1. Mississippi Constitution, Article 3, § 31.

John L. DAVIS and Prentiss Brooks
v.
STATE of Mississippi.
Misc. No. 1154A.
Supreme Court of Mississippi.
June 5, 1985.
Rehearing Denied Oct. 2, 1985.

On petition for postconviction relief, the Supreme Court, Dan M. Lee, held that:

69 N.Y.2d 339

The PEOPLE of the State of New York, Respondent,
v.
Samuel Rice JOHNSON, Appellant.

Court of Appeals of New York.

March 24, 1987.

Defendant was convicted of second-degree assault by the Monroe County Court. Twenty-three years later, when assault conviction was used as aggravating factor at sentencing phase of murder prosecution, defendant sought to have assault conviction set aside. The Monroe County Court, Connell, J., resentenced defendant on assault conviction, and defendant appealed. The Supreme Court, Appellate Division, 509 N.Y.S.2d 789, affirmed, and defendant brought permissive appeal. The Court of Appeals held that: (1) statute, providing that time for appealing from original judgment is not revived by resentencing that occurs more than 30 days after original sentence was imposed, did not prevent defendant from obtaining appellate review of assault conviction which had been imposed 23 years earlier, and (2) statute, providing that defendant must seek extension of 30-day period for taking appeal no more than one year after 30-day period has expired, did not preclude such review.

Conviction vacated; indictment dismissed.

1. Criminal Law ⇐1069(6)

Statute, providing that time for appealing from original judgment is not revived by resentencing that occurs more than 30 days after original sentence was imposed, did not prevent defendant from obtaining appellate review of assault conviction which was imposed 23 years earlier, and which was used as aggravating factor at subsequent murder prosecution, where defendant had made timely and diligent pro se efforts to obtain review of conviction prior to effective date of statute, and defendant's efforts had been thwarted by State. McKinney's CPL § 450.30, subd. 3.

2. Criminal Law ⇐1069(6)

Statute, providing that defendant must seek extension of 30-day period for taking appeal no more than one year after 30-day period has expired, did not prevent defendant from obtaining appellate review of assault conviction which was imposed 23 years earlier, and which was used as aggravating factor in subsequent murder prosecution, where defendant had made timely and diligent pro se efforts to obtain review of conviction prior to effective date of statute, and defendant's efforts had been thwarted by State. McKinney's CPL § 460.30.

3. Criminal Law ⇐1187

Assault conviction which had been used as aggravating factor at subsequent murder prosecution would be vacated, and indictment dismissed, where defendant raised appealable issues of possible merit, and State conceded that records of assault prosecution had been lost, and that neither reconstruction nor new trial was possible.

Laurence T. Sorkin and Anthony Paduano, New York City, for appellant.

Howard R. Relin Dist. Atty. (Melvin Bressler, Rochester, of counsel), for respondent.

OPINION OF THE COURT

PER CURIAM.

Defendant was convicted of murder in the State of Mississippi and presently awaits execution of a death sentence, which has been temporarily stayed pending decision on his petition for postconviction relief. To advance his efforts to obtain such relief, defendant now seeks reversal of a 1963 New York assault conviction, which was used as an aggravating factor at the sentencing phase of the Mississippi trial.

We construe the Appellate Division order as one affirming the judgment of resentence and determining that review of the underlying 1963 conviction was not avail-

able, 50v .2d 789. This order is appealable to t.. court (CPL 450.90).

We agree that, as the defendant argues and the People concede, the passage of time does not bar appeal in the unusual circumstances of this case, which include the possible use of the conviction as an aggravating factor leading to a death sentence. It is undisputed that defendant was never advised of his right to appeal from the assault conviction and that, upon discovering that right, he made several timely and diligent *pro se* attempts to obtain review of the judgment through the avenues available to him at the time. Further, it is undisputed that the actions of this State prevented defendant from ever obtaining the review of the conviction to which he was entitled.

[1, 2] The appeal is not barred by CPL 450.30(3), which provides, in essence, that the time for taking an appeal from the original judgment is not revived by a resentencing that occurs more than 30 days after the original sentence was imposed. Nor is appeal barred by CPL 460.30, which limits the time for seeking an extension of the 30-day period for taking an appeal to one year from the date that the statutory 30-day period expired. Both of these statutes became effective after the period between 1967 and 1971, when defendant's timely efforts to appeal were being thwarted by the State (*see, People v. Montgomery*, 24 N.Y.2d 130, 299 N.Y.S.2d 156, 247 N.E.2d 130). In these special circumstances, the People, as they correctly concede, cannot rely upon a subsequently imposed time limitation to prevent a defendant from obtaining appellate review of his conviction (*People v. Thomas*, 47 N.Y.2d 37, 416 N.Y.S.2d 573, 389 N.E.2d 1094). *People v. Corso*, 40 N.Y.2d 578, 388 N.Y.S.2d 886, 357 N.E.2d 357, which held CPL 460.30 applicable to appeals from judgments of conviction entered prior to that statute's enactment, does not require a different conclusion, since that decision did not [illegible] a situation in which the defendant had made timely efforts to raise an appealable issue before the statute was adopted.

[3] Finally, the People concede that the records of defendant's trial have been lost, that neither reconstruction nor a new trial is possible and that defendant has raised appealable issues with possible merit. Thus, the only available remedy at this point is vacatur of the conviction and dismissal of the indictment (*see, People v. Rivera*, 39 N.Y.2d 519, 384 N.Y.S.2d 738, 349 N.E.2d 825).

Accordingly, the order of the Appellate Division should be reversed, the conviction vacated and the indictment dismissed.

WACHTLER, C.J., and SIMONS, KAYE, TITONE, HANCOCK and BELLACOSA, JJ., concur in PER CURIAM opinion.

ALEXANDER, J., taking no part.

Order reversed, etc.

Cite as 509 N.Y.S.2d (Sup. 1986)

28

2

the State of New
Giles WADE,
itioner,

v.

, as Superintendent
ctional Facility, et
pondents.

pellate Division, Third
9, 1986. Application,
7002(b)(2) for writ of
(see, *People ex rel.*
A.D.2d 667, 469 N.Y.

ood KANE,
H and LEVINE, JJ.,

of Donald E.
Petitioner,

, Respondent.

Proceeding.)
ellate Division, Third
1986. Motion to
d, without costs, on
orders involved are
5701[a][2]).

d KANE, WEISS,
NE, JJ., concur.

1

POWER AUTHORITY OF the STATE OF NEW YORK, Appellant,

v.

Robert CAPUTO et al., Respondents.

(And Two Other Related Actions.)

Supreme Court, Appellate Division, Third Department. Dec. 18, 1986. Robert P. Nydam, P.C., Oneonta, for appellant. CASEY, Justice. Appeals from that part of (1) two orders of the Supreme Court (Ingraham, J.), entered June 20, 1986 in Otsego County, and (2) an order of said court, entered June 18, 1986 in Delaware County, which, after granting plaintiff's motions for preliminary injunctions, imposed certain limitations on the activities authorized by the injunctions. The limitations imposed by Supreme Court must be deleted (*Power Auth. of State of N.Y. v. Potocnik*, App.Div., 508 N.Y.S.2d 665; *Power Auth. of State of N.Y. v. Bowen*, 121 A.D.2d 840, — N.Y.S.2d —). Orders modified, on the law and the facts, without costs, by deleting the third decretal paragraphs thereof containing three limitations, and, as so modified, affirmed.

MAHONEY, P.J., and KANE, WEISS and LEVINE, JJ., concur.

2

PEOPLE, Respondent,

v.

Samuel Bice JOHNSON, Appellant.

Supreme Court, Appellate Division, Fourth Department. Dec. 3, 1986. Motion for summary reversal denied. Memorandum: Relief pursuant to *People v. Montgomery*, 24 N.Y.2d 130, 299 N.Y.S.2d 156, 247 N.E.2d 130, is no longer available (*see People v. Corso*, 40 N.Y.2d 578, 388 N.Y.S.2d 886, 357 N.E.2d 357). Under CPL 450.30(3), defendant's appeal following resentencing does not bring up for review the judgment of conviction and, hence, it is immaterial that the transcript of the trial testimony is unavailable.

DILLON, P.J., and CALLAHAN, DOERR, DENMAN and BOOMER, JJ., concur.

3

Charles J. LAUDICO, Respondent-Appellant,

v.

SEARS, ROEBUCK AND COMPANY, Moore Company, Appellants-Respondents. Appeal No. 2.

Supreme Court, Appellate Division, Fourth Department. Dec. 19, 1986. Mark G. Farrell by Joseph Krenitsky, Buffalo, for appellants-respondents. Paul William Beltz, P.C by Elizabeth Ciamerone, Buffalo, for respondent-appellant. Order unanimously modified on the law and as modified affirmed without costs, in accordance with same Memorandum as in *Laudico v. Sears, Roebuck and Company, Appeal No. 1*, App.Div., — N.Y.S.2d —, decided herewith. (Appeal from Order of Supreme Court, Erie County, Joslin, J.—Protective Order.)

DOERR, J.P., and GREEN, BALIO, LAWTON and SCHNEPP, JJ., concur.

...Daily Record Corp.

PREME COURT OF THE S ATE OF NEW YORK
App...ate Division, Fourth Judicial Department

People of the State of New York, Respondent,

v

Samuel Bice Johnson, Appellant.

A motion having been made on behalf of the appellant for reconsideration and renewal of the motion for summary reversal denied by order of this Court entered December 3, 1986

Now, upon reading and filing the statement of Laurence Sorkin dated December 8, 1986, the notice of said motion with proof of service thereof, and due deliberation having been had thereon,

It is hereby ORDERED, That said motion be, and the same hereby is denied.

Entered:

December 12, 1986

CARMEN S. LEONE, *Clerk*

STATE OF NEW YORK
COUNTY COURT COUNTY OF MONROE

THE PEOPLE OF THE STATE OF NEW YORK

-vs- Ind. No. 32/63

SAMUEL BICE JOHNSON

APPEARANCES: HOWARD R. RELIN
District Attorney of Monroe County
MELVIN BRESSLER
Assistant District Attorney
Of Counsel

CAHILL, GORDON, & REINDEL
Attorney for the Defendant
LAWRENCE SORKIN &
ANTHONY PADUANO
Of Counsel

DECISION AND ORDER

Connell, J.

The Defendant-Petitioner has made an application pursuant to CPL Section 440.10 to vacate his judgement of conviction entered on March 12, 1963 on the grounds that his state and federal rights were violated in that (1) he was never informe of his right to appeal; (2) that a confession that was alleged introduced at his trial was involuntarily made; and (3) that the alleged statement was made subsequent to his indictment but without the presence of counsel. This case is extremely unusual in many respects, both from the standpoint of the factual and legal issues raised but also from the fact that the defendant is presently on death row in the State of Mississippi following a conviction for murder of a Mississipp Highway Trooper. Apparently under the Mississippi death penalty statute, a defendant may not be sentenced to death

unless a jury determines there to be at least one aggravating circumstance which outweighs anything offered by the defendant in mitigation. In the defendant's case, the alleged aggravating circumstance is this 1963 conviction in New York for Assault in the Second Degree, which apparently qualified under the Mississippi statute as a prior violent felony conviction. The defendant here seeks to vacate this 1963 conviction as a prelude to seeking a new sentencing hearing in the State of Mississippi.

It would appear from the papers submitted by the defendant and the response papers of the People that the defendant and his co-defendant were arrested on February 11, 1963 concerning an alleged assault that took place on a woman in the City of Rochester on February 9, 1963. According to an affidavit of the attorney representing the defendant at that time, he first met his client just prior to his arraignment on February 26, 1963; was ordered to start trial on March 8, 1963; started trial on March 10, 1963; the verdict convicting the defendant of Assault in the Second Degree was returned March 12, 1963; and the defendant was sentenced on April 9, 1963 to a term of state incarceration. An affidavit by the Assistant Deputy County Clerk for Monroe County indicates that the Clerk's Office is unable to locate the trial transcripts, any hearing transcripts, any minutes by the clerk, jury instructions, physical evidence, or statements or confessions made by the defendant. An affidavit by the Chief Court Reporter for Monroe County indicates an inability to find the stenographic tapes or trial transcript of this case. The People concede the fact that the defendant was not properly informed of his right to appeal in 1963. By so conceding the People request that the Court remedy that error by vacating the sentance and order that the defendant be resentanced so that he can now begin his appeal process. The defendant requests that the conviction be vacated on the

theory that it was constitutionally invalid. Acknowledging that the defendant's case predated People v. Huntley, 15 NY2d 72, the defendant contends that the only proper forum for the issue as to the voluntariness of the defendant's statement is by way of coram nobis. The defendant urges that the Court make a determination based on the papers submitted that the defendant's rights were violated under the Huntley line of cases, or in the alternative, to hold a hearing on this issue.

I do not feel the papers as submitted sufficiently set forth facts which would require the Court, as a matter of law, to make such a determination.

The practical problems of both the defendant's and the People's suggested solutions in this case involve large hurdles to overcome. Acknowledged by all is the fact that resentencing would have to happen in Monroe County. All parties have doubts as to whether or not the Mississippi authorities would be willing to relinquish the custody of the defendant to the state authorities in New York for purposes of a resentencing since he is presently on death row. Also a review of Article 570 of the Criminal Procedure Law involving the law of extradition along with the knowledge of the sometimes lengthy process in implementing extradition proceedings make this solution unacceptable. It must be kept in mind that in this case "time is of the essence". It appears as if the Mississippi Supreme Court which has stayed the execution of the defendant pending the outcome of this application, has directed the parties to submit papers by November 6, 1986.

The People also urge that the defendant waive his right to be present at his resentencing. CPL Section 380.40(1) states that "the defendant must be personally present at the time sentance is pronounced." Is that right a waivable right?

The defendant in his papers and oral argument raised several persuasive arguments as to why he should not waive his rights to be present at any resentencing. The potential of creating another knot in this boondoggle of procedure in which all the parties find themselves also supports the defendant's position on that point.

However, the request of the defendant for a hearing presents the same problems as to how the defendant should or could waive his presence at such a hearing. Reasonable attempts to locate witnesses who could testify at a reconstruction hearing could also result in a "fatal" passage of time.

CPL Section 450.30(3) defines an appeal from a sentence as "an appeal from either the sentance originally imposed or from a resentence following an order vacating the original sentence."

CPL Section 440.10(2)(b) requires denial of the motion where the "judgement is, at the time of the motion, appealable . . ., and sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review thereof upon such an appeal, . . ."

There is no decision of the issues presented that will satisfactorily solve all the practical problems of this matter. However, this Court cannot and will not attempt to force jurisdiction on the Appellate Division by merely granting leave to the defendant to appeal the 1963 sentance and judgement. Nor can this Court decide the issues presented under coram nobis since, as the People concede, the defendant does fall within Section 440.10(2)(b).

Accordingly, the defendant's motion is denied in all respects and this Court will order the defandant resentance to afford him his right to appeal pursuant to CPL Section 450.30(3). This Court will also entertain an application, by both parties in view of the particular facts of this case, to allow the defandant to waive his rights under CPL Section 380.40 to be present at such resentancing.

Resentencing is scheduled for November 12, 1986.

Signed this 29th day of October, 1986 at Rochester, New York.

John J. Connell

JOHN J. CONNELL
County Court Judge